No. 79-1959

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IN THE

Supreme Court of the United States

October Term, 1979

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION,
ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents,

and

RONALD BECKER, ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The following cases were consolidated for pretrial purposes by the Judicial Panel on Multidistrict Litigation as *In re Beef Industry Antitrust Litigation* (Supermarkets) and transferred to the Honorable William M. Taylor, Jr., Judge of the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1407, and they were consolidated for the purposes of appeal to the United States Court of Appeals for the Fifth Circuit:

PONY CREEK CATTLE CO., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., et al.,
Plaintiffs-Intervenors-Appellants,
v.
THE GREAT ATLANTIC & PACIFIC TEA CO., et al.,
Defendants-Appellees.

No. CA 3-75-0702-C (N.D. Tex. June 5, 1975)

R. DIRK AGEE, et al.,
Plaintiffs-Appellants,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1237-C (N.D. Tex. September 7, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,
v.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1238-C (N.D. Tex. September 7, 1976)

RICHARD S. LOWE, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1244-C (N.D. Tex. September 7, 1976)

A. I. BLACK, et al.,
Plaintiffs-Appellants,

v.

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1248-C (N.D. Tex. September 7, 1976)

CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1253-C (N.D. Tex. September 7, 1976)

BURKE PETERSEN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1254-C (N.D. Tex. September 7, 1976)

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-76-1361 (N.D. Tex. September 7, 1976)

JOHN O. VARIAN, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

No. CA 3-76-1470-C (N.D. Tex. November 8, 1976)

MEAT PRICE INVESTIGATORS ASSOC., et al.,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0361 (N.D. Tex. March 16, 1977)

LITTLE RANCH CO., et al.,
Plaintiffs-Appellants,

v.

THE NATIONAL ASSOCIATION OF FOOD CHAINS, et al.,
Defendants-Appellees.

No. CA 3-77-0362-C (N.D. Tex. March 16, 1977)

RONALD BECKER, et al., on behalf of themselves
and all other persons similarly situated,
Plaintiffs-Appellants-Petitioners,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees-Respondents.

No. CA 3-77-0360 (N.D. Tex. March 16, 1977)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, cattle producers and feeders, petition this Court to issue a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals filed on August 17, 1979 which held that *Illinois Brick Co. v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977) bars primary producers of fat cattle from maintaining an action for treble damages under the federal antitrust laws where numerous large supermarket chains, the supermarkets' trade association, a beef commodity reporting service and other unnamed co-conspirators allegedly engaged in monopsonistic or oligopsonistic price-fixing and conspiratorial price depression which caused monetary damage to the business and property of primary producers of fat cattle, unless the action falls within an exception to the application of the rule in *Illinois Brick v. Illinois,* 431 U.S. 720 *rehearing denied,* 434 U.S. 881 (1977). A Petition for Rehearing and a Petition for Rehearing *En Banc* were denied on April 24, 1980.

OPINIONS BELOW

The pertinent Order of United States District Court for the Northern District of Texas is appended at A-53. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 600 F.2d 1148 (5th Cir. 1979) and is appended at A-1.

The denial of the Petition for Rehearing and Petition for Rehearing *En Banc* is reported at 609 F.2d 1008 (5th Cir. 1980) and is appended at A-49.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in the above-entitled actions on August 17, 1979, denied the Petitions for Rehearing and Rehearing *En Banc* on April 24, 1980; and the mandate was stayed on May 9, 1980 pending the disposition of this and other Petitions. This Petition seeking determination and relief as provided in 28 U.S.C. § 2106 was filed within ninety days of the denials of rehearing in accordance with 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The District Court has and had jurisdiction pursuant to 28 U.S.C. 1337(a), 15 U.S.C. §§ 1-2 and 15 U.S.C. §§ 15, 26.

QUESTIONS PRESENTED

1. Does the decision of the United States Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977) bar fat cattle producers, as *sellers* of fat cattle to packers and slaughterers, from maintaining an action under Section 4 of the Clayton Act for treble damages against supermarket chains and others arising from the sales into a market rigged, in violation of the federal antitrust laws, by the supermarkets, the supermarkets' trade association, a beef-commodity reporting service and other co-conspirators, unless the claims fall within the ambit of an exception to the rule in *Illinois Brick*?

2. Did the United States Court of Appeals for the Fifth Circuit erroneously concluded that the District Court properly dismissed with prejudice Plaintiffs' cause of action for a combination or conspiracy to fix prices (by granting Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted and Motion for Judgment on the Pleadings [Rules 12(b)(6) and 12(c) of the Federal Rules of Civil

Procedure]), because Plaintiffs' complaints failed to properly allege a conspiracy to fix prices between the named defendants and the unnamed co-conspirators?

3. Did the United States Court of Appeals for the Fifth Circuit erroneously affirm the District Court's denial of Petitioners' Motion for Leave to Amend their Pleadings pursuant to Rule 15 of the Federal Rules of Civil Procedure?

STATUTES AND RULES INVOLVED

The pertinent provisions of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, the Clayton Act, 15 U.S.C. §§ 15 and 26, and the Federal Rules of Civil Procedure, Rules 8, 12 and 15, are appended at B-1 *et seq.*

STATEMENT OF THE CASE

A. Course of Proceeding and Disposition in Court Below

The actions involved in this Petition are antitrust actions brought by fat cattle producers and feeders against numerous large supermarket chains, the supermarkets' trade association (formerly known as the National Association of Food Chains and now known as the Food Marketing Institute), a beef-commodity reporting service (known as the National Provisioner, Inc., publisher of The National Provisioner Daily Market and News Service, which is commonly known as the "Yellow Sheet"), and other unnamed co-conspirators. The complaints allege that the concerted activities of these defendants violate the provisions of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1-2), and damaged the plaintiffs (petitioners herein) by depressing the price of fat

cattle. These actions and other similar actions pending in the Northern District of Texas have been consolidated by order of the Judicial Panel on Multidistrict Litigation for pretrial purposes before the Honorable William M. Taylor, Jr., pursuant to 28 U.S.C. § 1407. *In Re: Beef Industry Antitrust Litigation*, 419 F.Supp. 720 (J.P.M.L. 1976), and subsequent orders pursuant thereto (tag-along cases).

The complaints, as amended, are brought by the plaintiffs for treble damages and for injunctive relief, under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). These petitioners, who respectfully petition this Court for the issuance of a Writ of Certiorari, are:

1. *Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.* This action was originally filed on December 1, 1975, in the Southern District of Iowa. Meat Price Investigators Association is an Iowa unincorporated association and trust of over 450 individual cattle-raising entities. This action originally named ten supermarket-chain defendants and the two non-chain store defendants. On September 1, 1977, by leave of the District Court, the complaint was amended to name eight additional supermarket defendants.

2. *Ronald Becker, et al., on behalf of themselves and all other persons similarly situated, v. Safeway Stores, Inc. et al.* This action was originally filed in the Southern District of Iowa on August 10, 1976. The plaintiffs presently are five individual fat cattle feeders who propose to bring a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle, and who have within the four years immediately preceding the filing of the action, sold more than

100 head of fat cattle in any one year.[1] The defendants to the *Becker* action are identical to the defendants in the *MPIA* action. On September 1, 1977, by leave of the District Court, the *Becker* action was also amended to name eight additional retail food chain stores as defendants.

On June 17, 1977, the defendants filed Motions to Dismiss and for Judgment on the Pleadings pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure, and predicated the motions upon this Court's recent decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977).

On September 1, 1977, pursuant to leave of the District Court, the plaintiffs filed Amended and Substituted Complaints in the *MPIA* and *Becker* cases (App. at A-58).

On September 13, 1977, ten of the defendants filed a Motion to Dismiss under Rule 12 of the Federal Rules of Civil Procedure addressed generally to the Amended and Substituted Complaints in *MPIA* and *Becker*. The plaintiffs resisted this motion and the matter came on for hearing before the District Court on September 28, 1977.

On this motion, the District Court dismissed plaintiffs' cases with prejudice by its December 9, 1977 ruling and Order (App. at A-53).

In its ruling and Order of December 9, 1977, the Trial Court therein sustained, without opinion, the defendants' Motion to Dismiss on the basis of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 *rehearing denied*, 434 U.S. 881 (1977), and on January 24, 1978, the Trial Court refused, without stating

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[1] The agricultural census figures compiled by the U.S. Department of Agriculture for the early 1970's indicate that approximately 81% of all fat cattle, is marketed in the United States in 11 of these states by approximately 20% of the producers of fat cattle.

reasons, to allow the plaintiffs leave to further amend their Complaint. A-53 and A-56. The petitioning plaintiffs herein filed timely notices of appeal on February 22, 1978.

On August 17, 1979, the United States Court of Appeals for the Fifth Circuit entered judgment, mandate stayed until June 8, 1980 (App. A-1 through A-48 and A-50), reversing and remanding the consolidated appeals to the District Court for the Northern District of Texas for further proceedings consistent with the following conclusions of the Court:

1. Although the Circuit Court of Appeals agreed with the District Court that the rule of *Illinois Brick* bars the maintenance of a civil antitrust action by the *primary producer-sellers* into a rigged market as indirect *sellers*, the Circuit Court of Appeals held that the Amended and Substituted Complaints stated a cause of action under the "cost-plus exception" to *Illinois Brick;*

2. The Amended and Substituted Complaints fail to allege a conspiracy between and among the supermarkets and other co-conspirators; and

3. The District Court did not abuse its discretion in denying Plaintiffs' Motion to Amend their pleadings pursuant to Rule 15, Fed. R. Civ. Pro.

The Court of Appeals denied Plaintiffs' Petitions for Rehearing and Rehearing *En Banc* on April 24, 1980 and the mandate was stayed on May 9, 1980 pending the disposition of this Petition. App. A-49.

B. Statement of Facts

Plaintiffs in *MPIA* and *Becker*, in their Amended and Substituted Complaints (App. at A-58 through A-101), aver the following facts which are pertinent to the defendants' motions to dismiss:

> (25) Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof. (*MPIA* and *Becker*, paragraph 25)
>
> (26) Cattle are raised and fed on farms, ranches and feedlots . . . . Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle. (*MPIA* and *Becker*, paragraph 26)
>
> (27) A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short-term is known throughout the industry and is inelastic. (*MPIA* and *Becker*, paragraph 27)
>
> (28) The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis

for the price given plaintiffs . . . by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or "Yellow Sheet" for all transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the 'Safeway price.' (*MPIA* and *Becker*, paragraph 28)

(29-30) Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. . . . A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains. (*MPIA* and *Becker*, paragraphs 29-30)

(31) A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is de-

signed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle. (*MPIA* and *Becker*, paragraph 31)

(32) The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef. (*MPIA* and *Becker*, paragraph 32)

(33) Approximately 80 percent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendants chain stores to the cattlemen. (*MPIA* and *Becker*, paragraph 33)

(34[3]) The defendant feed chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef for wholesale. Instead

they have agreed that A&P and Safeway, and other defendants and co-conspirators will utilize the Yellow Sheet or 'Safeway price.' This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle. (*MPIA* and *Becker*, paragraph 34[3])

(34) Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the 'Safeway price,' the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any dimunition of sales, purchases, margins or profits as a result of this artificially low price. (*MPIA* and *Becker*, paragraph 34)

ARGUMENT

A. The Decision In Illinois Brick Does Not Bar Claims of Primary Sellers Into A Rigged Market.

Petitioners assert that the Circuit Court erred in approving the District Court's dismissal *with prejudice*, of the plaintiffs' causes of action under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act on the ground that said causes of action fall within the ambit of the policy prohibitions of *Illinois Brick*.

1. Plaintiffs-Petitioners have Suffered Injuries within the Meaning of Section 4 of the Clayton Act.

The language of Section 4 of the Clayton Act (15 U.S.C. § 15) is broad and inclusive. It provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee.

The Supreme Court has held that this language makes the act equally as applicable to sellers as to purchasers:

> The statute does not confine its protection to consumers, to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States v. Socony-Vacuum Oil Co. 310 US 150, 84 L ed 1129, 60 S Ct 811; American Tobacco Co. v. United States, 328 US 781, 90 L ed 1575, 66 S Ct 1125. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States v. South-Eastern Underwriters Asso. supra (322 US at 553, 88 L ed 1457, 64 S Ct 1162).

Mandeville Island Farms v. American Crystal Sugar Company, 334 U.S. 219 (1948) *rehearing denied.* As sellers, then, petitioners have standing to redress the injury to their "business or property" by the actions of defendants about which plaintiff-petitioners have complained (*See Reiter v. Sonotone*, 442 U.S. 330 [1979]).

2. The Policy Decision Announced in *Illinois Brick* Applies Only to Direct Purchasers Who Have Been Penalized by an Illegal Overcharge.

In *Illinois Brick*, this Court held:

> [T]he longstanding policy of encouraging vigorous private enforcement of the antitrust laws, see, e.g., Perma Life Mufflers, Inc. v. International Parts Corp. 392 US 134, 139, 20 L Ed 2d 982, 88 S Ct 1981 (1968), supports our adherence to the Hanover Shoe rule, under which direct purchasers are not only spared the burden of litigating the intricacies of pass-on but also are permitted to recover the full amount of the overcharge. We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers. But on balance, and until there are clear directions from Congress to the contrary, we concluded that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4, Hawaii v. Standard Oil Co. of California, 405 US, at 262, 31 L Ed 2d 184, 92 S Ct 885, is better served by holding *direct purchasers* to be injured to the full extent of the *overcharge paid* by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.

431 U.S. 745-46 (1977). Emphasis added.

The gravamen of plaintiffs' complaints is, however, that plaintiffs are damaged, not by *payment* of *overcharges*, but by the artificially depressed prices in the market into which they are compelled to sell fungible product. The Amended and Substituted Complaint alleges, that plaintiffs have suffered,

among other things, a "loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the price they would have received had free market conditions existed." App. A-77. Because there is no allegation of an overcharge to the middlemen by defendant supermarkets, there is no opportunity for defendants to assert a pass-on (of damages) defense. Indeed, should there be an assertion of the "pass-on theory" by the named defendants in this case, said defendants would place themselves in the astounding posture of defending the action by asserting that they did not pay adequate compensation for their supplies of beef.

These causes of action pose no apportionment problem because no *overcharge* has been *paid.* The allegations of the Amended and Substituted Complaint assert a depressed market price for fat cattle. (Amended and Substituted Complaint, paragraph 34 App. A-73). If a pass-on theory of damages were to be asserted by defendants, the allocation problem within the chain of *supply* to the supermarkets becomes a problem of allocating *unpaid* amounts of money, which is an entirely different problem than that addressed in *Illinois Brick.*

The problem addressed by this Court in *Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down." The cattlemen, who are selling their perishable product at a conspiratorially depressed price into a market which, in the short term is inelastic, can

neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into a rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among various levels of the market itself.

3. Plaintiffs are Direct Sellers into a Market Alleged to be Conspiratorially Rigged.

The nature of the alleged conspiracy itself makes the pass-on rule in *Illinois Brick* inappropriate to this cause. Plaintiffs have alleged that various other companies, firms, associations, and individuals have participated as co-conspirators to rig the market causing illegal depression of the prices paid to producers of fat cattle (App. A-67). Assuming, for the sake of argument, that such a conspiracy existed, it is a combination or conspiracy of the middlemen with the named defendants. Hence, the first parties outside of the conspiracy to deal with the combination or conspiracy and suffer loss therefrom are the plaintiffs.[2]

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[2] *See Reiter v. Sonotone Corp*; Trade Reg. Rep. (CCH) ¶63,212 (1980) *appeal denied* Misc. No. 80-8058 (8th Cir. May 23, 1980) ("When the manufacturers and retailers conspire to fix the prices . . . such competition is foreclosed and the market is no longer competitive. Such price-fixing activities by manufacturers and retailers is a per se violation of Section 1 of the Sherman Act." and further "Because the purchaser, including the plaintiff herein . . . is paying the overcharge directly, no assertion that an overcharge has been passed on to it from another injured party will be necessary to prove the alleged damages.); *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968) held that a newspaper publisher's combination with others for the purpose of forcing a distributor to maintain specified maximum prices for resale of newspapers which he has purchased from the publisher constitutes a combination in restraint of trade under Section 1 of the Sherman Act [15 U.S.C. § 1])

4. Plaintiffs' Claims do not Assert the Offensive Use of the Pass-on Theory under *Illinois Brick*.

The Circuit Court recognizes, at footnote 24 of its opinion, that plaintiffs' theory of damages is not founded on a "pass-on" theory.

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It's enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from plaintiff based his pricing decision on the depressed wholesale beef price. . . .

App. A-37, n. 24.

With this incisive observation, the Court has, at once recognized and then ignored that plaintiffs have stated a cause of action under Rule 12 of the Federal Rules of Civil Procedure and within Section 1 of the Sherman Act. That Court also eliminated the problem of apportionment of overcharges paid through the chain of supply and effectively precludes this case from falling within the ambit of *Illinois Brick*.

B. The United States Court of Appeals for the Fifth Circuit Erroneously Concluded that the Petitioners Failed to Allege a Conspiracy or Combination to Fix Prices Between the Named Defendants and Middlemen.

Rules 8(a), (e) and (f) of the Federal Rules of Civil Procedure require only "simplified notice pleading . . ." (*Conley v. Gibson*, 355 U.S. 41, 48 [1957]): "No technical forms of pleadings are required"; and "All pleadings shall be so construed to do substantial justice."

Plaintiff-Petitioners' First Amended and Substituted Complaints allege:

> 25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.
>
> and
>
> 34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet of the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artifically low price.

It is axiomatic that when a complaint is the subject of motions under Rules 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure, the Court must take all allegations in the complaint as true, together with all inferences and intendments thereto; only if there is *no set* of facts under which the plaintiffs could recover, should the Court grant a dismissal with prejudice. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equip. v. Food Mach. Chem. Corp.*, 382 U.S. 172, 175 (1965); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, a plaintiff suing under the federal antitrust laws is not required to sue all members of the combination or conspiracy. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1244 n.42 (3d Cir. 1975); *National Wrestling Alliance v. Myers*, 325 F.2d 768, 775 (8th Cir. 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903) *aff'd*, 203 U.S. 390 (1906).

When viewing the Amended and Substituted Complaints in the light most favorable to the plaintiffs, giving the plaintiffs the benefit of all reasonable intendments and inferences thereto and liberally construing the same, the Amended and Substituted Complaints support a finding that a conspiracy in violation of the antitrust laws has existed between the defendant supermarkets and middlemen which depressed fat cattle prices—the target of which has been the cattle producer. The Amended and Substituted Complaints allege that other coconspirators and other concurrent conspiracies have jointly and/or severally and/or concurrently injured plaintiffs in their businesses and properties and performed acts and made statements in furtherance thereof. (*Supra* at A-25).

Further, the Complaints allege that the packers and slaughterers had standing agreements for fixed quantities of beef from the named defendants and that they established the price paid to the plaintiffs through the use of the "Yellow Sheet." (*Supra* at A-71).

It is well established that "a vertical combination or combination of non-competitors may conspire to restrain unreasonably the interstate trade and commerce of third parties and thereby subject themselves to the prohibitions of the Sherman Act." *United States v. General Motors Corp.*, 121 F.2d 376, 404 (7th Cir. 1941), *cert. denied*, 314 U.S. 618, *rehearing denied*, 314 U.S. 708 (1941). Indeed, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960), involved a three-tier conspiracy among manufacturer, wholesalers, and retail sellers aimed at retail purchasers. Further, it is well established that facts similar to those alleged in these Amended and Substituted Complaints can establish a combination and conspiracy in restraint of trade and a combination to monopolize aimed at producers such as the plaintiff fat cattle producers (*American Tobacco Co. v. United States*, 328 U.S. 781 [1946]; *Swift & Co. v. United States*, 196 U.S. 375 [1905]), and such allegations give rise to a private damage action under Section 4 of the Clayton Act by producers such as the plaintiffs. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

Therefore, the United States Court of Appeals for the Fifth Circuit erred in holding that Plaintiffs' Amended and Substituted Complaints did not allege a combination or conspiracy between and among the named defendants and their unnamed co-conspirators..

C. The United States Court of Appeals for the Fifth Circuit Erroneously Affirmed the United States District Court's Denial of Plaintiffs' Motion for Leave to Amend their Pleadings.

Rule 15(a) of the Federal Rules of Civil Procedure (App. at A-105) provides that the Trial Court shall freely grant leave to amend the pleadings "when justice so requires." As stated by this Court, "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). *Accord, Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961).

Although the District Court concluded that the actions were appropriately dismissed with prejudice under *Illinois Brick* and that "justice does not require leave to amend" (App. at A-56), the District Court failed to make any findings to support its conclusions.

> [T]he grant or denial of an opportunity to amend is within the discretion of the District Court, *but outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion* and inconsistent with the spirit of the Federal Rules. (Emphasis added.)

Foman v. Davis, 371 U.S. 178, 182 (1962). *Accord, Griggs v. Hinds Junior College*, 563 F.2d 179 (5th Cir. 1977); *Scott v. Eversole Mortuary*, 522 F.2d 1110 (9th Cir. 1975); *Sarter v. Mays*, 491 F.2d 675 (5th Cir. 1974).

Even though the District Court provided no reasons for its refusal to allow the plaintiffs leave to amend, the Circuit Court affirmed the refusal upon its independent conclusions that there was undue delay and amendment would be futile.

The Circuit Court erred in concluding that there was undue delay in the absence of supportive findings that indicate that the defendants are prejudiced thereby. *Griggs v. Hinds Junior College*, 563 F.2d 179 (5th Cir. 1977); *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 288 F.2d 69 (5th Cir. 1961). The Circuit Court also erred in concluding that granting leave to amend would be futile because: *Illinois Brick* applies to *overcharges paid* by purchasers—not to *sellers* into a rigged market; plaintiffs are not required to sue all co-conspirators; and "[t]he plaintiffs' theory of damages is not in all respects a pass-on type of theory" (Circuit Court Opinion, App. at A-37 n. 24).

> Granting leave to amend is especially appropriate, in cases such as this, when the trial court has dismissed the complaint for failure to state a claim.

Griggs v. Hinds Junior College, 563 F.2d 179, 180 (5th Cir. 1977). The Circuit Court recognized, in holding that Plaintiffs had stated a claim under the "cost-plus" exception to *Illinois Brick*, that there are facts, if proved, that would allow plaintiffs to recover under the antitrust law of the United States.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.

Foman v. Davis, 371 U.S. 178, 182 (1962). Therefore, the Circuit Court erred in affirming the District Court's denial of plaintiffs' Motion for leave to amend their pleadings to include an alternate theory of recovery.

CONCLUSION

In the interest of protecting the primary producers of fungible agricultural products by ensuring the existence of a free and competitive marketplace, the Petitioners respectfully request that this Court grant Petitioners' Petition for a Writ of Certiorari in these causes of actions.

Dated: June 6, 1980.

Respectfully submitted,

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79-1959

No._____

Supreme Court, U. S.
FILED
JUN 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION,
ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents,

and

RONALD BECKER, ET AL.,

Petitioners,

vs.

SAFEWAY STORES, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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APPENDIX

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET
No. 248.
PONY CREEK CATTLE CO., INC., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., etc., et al.,
Plaintiffs-Internevors-Appellants,
vs.
THE GREAT ATLANTIC & PACIFIC TEA CO. et al.,
Defendants-Appellees.
R. DIRK AGEE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
MEAT PRICE INVESTIGATORS
ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
RICHARD S. LOWE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

A. I. BLACK, et al.,
Plaintiffs-Appellants.
vs.
ALBERTSON'S, INC., et al.,
Defendants-Appellees (two cases).
CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
BURKE PETERSEN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
RONALD BECKER et al., on behalf of
themselves and all other persons
similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
JOHN O. VARIAN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS ASSOCIATION et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.
LITTLE RANCH CO., INC., et al.,
Plaintiffs-Appellants,
vs.
THE NATIONAL ASSOCIATION OF FOOD CHAINS, etc., et al.,
Defendants-Appellees.

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT
Aug. 17, 1979

Cattlemen, ranchers and feeders brought private actions against 25 retail food chains, a wholesale grocer, the retail chains' national trade association and a beef industry price reporting publication alleging violations of federal antitrust laws. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., dismissed the actions with prejudice for failure to state claims upon which relief can be granted. On appeal, the Court of Appeals, Wisdom, Circuit Judge, held that: (1) claims for damages were within

ambit of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers; (2) complaints stated claims for damages within "cost-plus" exception to *Illinois Brick* bar; (3) *Illinois Brick* bar had no application to claims for injunctive relief; (4) complaints alleging retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy stated sufficient injury to one's "property" within meaning of Clayton Act; and (5) genuine issues of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act.

Reversed and remanded.

1. Monopolies — 28(1.6)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers applied to suits brought by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication seeking relief for violations of Sherman Act. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

2. Monopolies — 28(1.6)

There is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes and application of rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. § 15, 26.

3. Monopolies — 28(1.7)

In actions by cattlemen, ranchers and feeders against retail food chain, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchases applied to complaints against trade publication and trade association even though they did not buy or sell beef at all and there were no firms in beef marketing system that dealt directly with them. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

4. Monopolies — 28(6.1)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in failing to give plaintiffs opportunity to amend their complaints, after *Illinois Brick* decision barring damages actions against alleged price fixers by indirect purchasers, to allege a vertical conspiracy, and by denying postjudgment requests for leave to amend. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

5. Federal Civil Procedure — 833

Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as result of rulings on a point of law handed down during pendency of litigation.

6. Monopolies — 28(6.2)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' retail trade asso-

ciation and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaint stated cause of action within "cost-plus" exception to rule of *Illinois Brick* barring damages actio against alleged price fixers by indirect purchasers. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

7. Monopolies — 28(1.6)

One who deals with a nonconspiring competitor of price fixing firms has standing to sue those firms for treble damages. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26.

8. Monopolies — 24(7)

Rule of *Illinois Brick* barring damages actions against alleged price fixers by indirect purchasers has no application to claims for injunctive relief. Clayton Act, § 16, 15 U.S.C.A. § 26.

9. Monopolies — 28(6.7)

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, complaints of retail price fixing which also alleged that some of plaintiffs had purchased beef as consumers at prices affected by alleged conspiracy sufficiently alleged an injury to one's "property" within meaning of Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

10. Monopolies — 28(1.6)

Only those within "target area" of alleged antitrust conspiracy have standing to sue. Clayton Act, § 4, 15 U.S.C.A. § 15.

11. Federal Civil Procedure — 103

Question of standing is a preliminary one, to be answered from examination of allegations of complaint.

12. Federal Civil Procedure — 650

Although unnecessary evidentiary details are usually not stricken from complaint unless prejudicial or of no consequence to controversy, evidence pleading, as distinguished from pleading of ultimate facts, is not favored under federal rules. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

13. Federal Courts — 817

District court's action in striking material from complaint will not be disturbed unless it was an abuse of discretion. Fed. Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

14. Federal Civil Procedure — 1124

In actions by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, district court did not abuse its discretion in striking evidentiary details concerning alleged retail price-fixing conspiracy from complaint even if such allegations were relevant to claims of price fixing at wholesale level. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

15. Federal Civil Procedure — 2011

District court's order striking pleadings does not control issues of materiality and relevancy that govern admissibility of evidence. Fed.Rules Civ.Proc. rule 8(a), 28 U.S.C.A.

16. Limitation of Actions — 104(1)

Fraudulent concealment tolls Clayton Act's statute of limitations. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

17. Limitation of Actions — 104(1)

To avail himself of fraudulent concealment tolling doctrine of Clayton Act's statute of limitations, antitrust plaintiff must show that defendant concealed conduct complained of, and that he failed, despite exercise of due diligence on his part, to discover facts that form basis of his claim. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

18. Federal Civil Procedure — 2557

In action by cattlemen, ranchers and feeders against retail food chains, wholesale grocer, retail chains' national trade association and beef industry price reporting publication involving alleged violations of federal antitrust laws, genuine issue of fact existed as to when plaintiffs had actual or constructive knowledge of their cause of action, precluding partial summary judgment on their claim that defendants' fraudulent concealment of alleged conspiracy tolled four-year statute of limitations of Clayton Act. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

Appeals from the United States District Court for the Northern District of Texas.

Before WISDOM, HILL, and FAY, Circuit Judges.

WISDOM, Circuit Judge:

These consolidated appeals involve the applicability of *Illinois Brivk Co. v. Illinois*, 1977, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707, to sales by primary producers to middlemen at prices allegedly depressed by price-fixing at the retail level of distribution. The appeals also present other difficult questions concerning federal antitrust laws.

These appeals arise from thirteen private antitrust actions alleging that the concerted activities of the defendants violate the provisions of §§ 1 and 2 of the Sherman Antitrust Act,

15 U.S.C. §§ 1 and 2. The complaints ask for treble damages and for injunctive relief under §§ 4 and 16 of the Clayton Act, 15 U.S.C. 15 and 26. The plaintiffs are cattlemen, ranchers and feeders. The defendants are twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication.[1] The plaintiffs in the various suits charge that the retail chains combined, primarily by using the trade association and the price reporting publication, to fix at artificially low levels the prices at which beef is purchased from slaughterhouses and meat packers, and ultimately from the producers—cattle ranchers and feeders. The resulting depression in wholesale prices to retailers, passed up the chain of distribution, reduced the prices which the plaintiffs received in selling their cattle to the packers and slaughterhouses.

The Judicial panel on Multidistrict Litigation assigned the cases to the District Court for the Northern District of Texas, for coordinated or consolidated pretrial proceedings. *In re Beef Industry Antitrust Litigation,* 419 F.Supp. 720 (Jud. Pan.Mult.Lit., 1976). In June 1977 the Supreme Court handed down its decision in *Illinois Brick,* holding that a purchaser could not maintain an antitrust damage action against a seller remote from him in the chain of distribution; rejecting, the

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[1] The lawsuits involved in this appeal are: *Petersen et al. v. Safeway Stores, Inc., et al.*; *Pony Creek Cattle Co., et al. v. The Great Atlantic & Pacific Tea Co., et al.*; *Lowe, et al v. Safeway Stores, Inc., et al.*; *Meat Price Investigators Ass'n et al. v. Safeway Stores, Inc., et al.*; *Shoshone Tribe of Duckwater, et al. (formerly styled Agee, et al.) v. Safeway Stores, Inc., et al*; *Black, et al. v. Acme Markets, Inc., et al.*; *Chapparal Cattle Corp., et al. v. Safeway Stores, Inc., et al.*; *Becker, et al. v. Safeway Stores, Inc., et al*; *Varian, et al. v. Safeway Stores, Inc., et al.*; and *Little Ranch Co., et al. v. The National Association of Food Chains, et al.*

narrow exceptions, the offensive use of "passing-on".[2] Shortly thereafter the defendants moved for dismissal of the complaints on the ground that the plaintiffs' theory of damages (sellers suing remote purchasers) was a "pass-on" theory indistinguishable in all important respects from the theory of damages (purchasers suing remote sellers) at issue in *Illinois Brick*. The district court agreed with the defendants and dismissed the complaints with prejudice for failure to state claims upon which relief could be granted. The court did not file an opinion, but stated from the bench that the dismissal was based on *Illinois Brick*.

The main issue is whether the complaints should have been dismissed on the strength of *Illinois Brick*. The plaintiffs/appellants also urge that the district court erred in striking from the complaints allegations of retail price-fixing. The plaintiffs in *Pony Creek Cattle Co., Inc., et al. v. The Great Atlantic & Pacific Tea Co., et al.* appeal partial summary judgments granted against them on their allegation that the statute of limitations was tolled because the defendants fraudulently concealed the alleged conspiracy. We agree with the defendants-appellees that the claims for damages, as pleaded, are within the ambit of the rule of *Illinois Brick*. Nevertheless we reverse and remand in all thirteen cases because the complaints state claims for damages within the "cost-plus" exception to the *Illinois Brick* bar. We reverse the partial summary judgments entered on the issue of fraudulent concealment in

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[2] "Passing-on" usually means the process whereby a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward in sales to a lower level in the chain to reflect the overcharge. This case presents the converse of that situation. Here the passing-on was the result of alleged depressed prices fixed by retailers and imposed upon the middlemen (slaughterhouses and packers). In turn, the middlemen passed-on the undercharge, the depression in prices, to the primary producers (cattle ranchers and feeders).

Pony Creek. In the *Agee* and *Varian* cases, we reverse the district court's order striking the allegations of retail price-fixing. In addition, we hold that the complaints in all the cases state claims for injunctive relief under section 16 of the Clayton Act.

I

These actions were dismissed on the pleadings. The allegations of the complaints therefore are taken as true for purposes of these appeals.

The plaintiffs are all cattle ranchers or feeders or both. Cattle are bred and raised on farms, ranches, and commercial feedlots. The animals are fattened for slaughter by feeding them a concentrated ration for fast growth. Ranchers either fatten the cattle themselves or sell to or place the livestock with feeders for fattening. Most fat cattle, say the plaintiffs-appellants, are purchased by slaughterhouses and packers directly from the ranchers and feedlots, although some are purchased by the slaughterers through auction markets. The cattle are then slaughtered and most of the beef is sold as either boxed or carcass beef to retail and wholesale grocers. The large retail food chains buy most of their beef directly from slaughterers and packers. The complaints do not allege a conspiracy between the slaughterers and packers and the defendants.

The plaintiffs allege that the wholesale or carcass price of beef, the price paid by the retail chains to packers and slaughterers, is established by the large retail chains acting in concert. For any given week, it is alleged, the wholesale price in a given area of the United States is set by the pricing decision of the A & P or Safeway Stores, Inc. or the Kroger Co. or one of the other defendants. In antitrust jargon, each wields monopsony power in its region or, with others, oligopsony

power.[3] One designated retail chain in a given area will buy its beef in the regional wholesale market early in the week. The pricing decisions of the leading purchasers in the various regions of the nation are reported in the National Provisioner, Daily Market and News Service, ("National Provisioner") or "Yellow Sheet", and thus become known to the entire wholesale beef trade. The other retail chains, it is alleged, then follow the price established by the regional leader in purchasing their requirements of beef for the period. The chains, according to the complaints, can dictate the wholesale price to the packers because they wield monopsony or oligopsony power and because the packers have no long-term storage facilities and therefore cannot withhold their product.[4] The chains' power is augmented by their considerable cold-storage capacity: they can blunt price rallies by abstaining from the wholesale market and working from their stockpiles.

The price depressions thus engineered are directly "passed on" to the ranchers and feeders, according to the complaints. The plaintiffs allege that the cattlemen, like the slaughterers and packers *vis-a-vis* the chains, are in no position to negotiate prices because they cannot, at least in the short term, withhold their product. A fattened steer or heifer, the complaints allege, must be sold within three weeks of the time it reaches choice grade. If the animal is not sold in that time it becomes over-fattened and hence less valuable. The supply of fat cattle is therefore inelastic in the short term. The cattlemen contend

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[3] We use the term "monopoly" to refer to price-fixing by sellers; "monopsony" and "oligopsony" to refer respectively, to price-fixing by a single purchaser or by a group of purchasers, that is, the retailers/defendants in this case.

[4] Chainwide pricing decisions for a given region are made possible, according to the allegations of the complaints, by the chain's centralized buying practices. Purchases are made for an entire chain or for a large part of a chain, it is alleged, from a central location.

that they must take the price the packers quote. The packers according to the complaints, bid prices derived directly from the Yellow Sheet (or, west of the Rockies, the Safeway) carcass price. Working from estimates of the percentage of an animal that will be carcass beef salable to the retail chains, the packers pay cattle prices based on the Yellow Sheet prices.[5] Thus, the allegedly artificially low wholesale prices established by the retail chains' combination translate directly into artificially low prices for fat cattle.

The plaintiffs do not know when this alleged conspiracy began, but contend that it has been in operation since 1963 at the latest. The food chain defendants, according to the complaints, coordinate their efforts through meetings conducted by the National Association of Food Chains. The conspirators allegedly effect their price-fixing schemes by allocating to dominant chains geographical areas in which to exercise price leadership, and by controlling or manipulating the "Yellow Sheet". The elimination of price competition is further assured by alleged agreements concerning the conspirators' respective specifications for beef. The plaintiffs charge that the chains in any given region coordinate their specifications so that the chains do not compete with each other in purchasing beef of their respective specifications.

The complaints were filed in 1975. The cattlemen charge that the scheme violates section 1 of the Sherman Act, because it is a scheme "in restraint of trade and commerce". They also contend that the scheme was "an attempt to monopolize" and

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[5] As explained in Paragraph 28 of the Amended and Substituted Complaint in the *Meat Price Investigators Association* ("*MPIA*") suit:

> Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

had the effect of monopolizing the wholesale beef market in violation of section 2 of the Act. The complaints also allege that the retail chains fix the retail price of beef to consumers. They request injunctive relief, under section 16 of the Clayton Act, and treble damages going back to the beginning of the alleged conspiracy. The Clayton Act's four-year statute of limitations would ordinarily operate to limit recovery to damages accruing within four years of the filing of the complaints.[6] The plaintiffs, however, urged that the defendants and their co-conspirators fraudulently concealed the conspiracy from the beginning, and that the statute of limitations therefore did not begin to run until the plaintiffs discovered, in July 1974, that the alleged conspirators had indeed met to discuss the pricing of beef.[7]

In late 1975, before the instant actions were consolidated in the Northern District of Texas, that court entered partial summary judgments in the *Pony Creek* case, a suit originally filed in the Northern District of Texas, dismissing with prejudice the *Pony Creek* plaintiffs' claims for damages that accrued prior to June 5, 1971. In December of 1976, following the consolidation of the various actions in the Northern District of Texas, the defendants filed motions for partial summary judgment on the statute of limitations issue in the remaining suits. The district court denied those motions. The *Pony Creek* plaintiffs filed a motion to vacate the earlier par-

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[6] Section 4B of the Act, 15 U.S.C. § 15b, states, in relevant part:

> Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued.

[7] That information was allegedly disclosed during discovery in *Bray, et al. v. Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975), a suit virtually identical to the instant actions brought by California cattlemen against many of the defendants in these cases.

tial summary judgments entered against them, but the district court has not acted on that motion.

In June 1977 the defendants in all the cases filed a joint motion for judgment on the pleadings based on the Supreme Court's opinion in *Illinois Brick*. They pointed out the absence of any allegations that the plaintiffs had sold cattle directly to the defendant retail chains. The suits, they contended, were therefore barred by the general rule of *Illinois Brick* that only those parties who have dealt directly with members of a price-fixing conspiracy can maintain an antitrust action for damages against the price-fixers. The plaintiffs asked the district court to stay its ruling on the defendants' motion pending further discovery. Six months later, in December, 1977, the district court entered its order dismissing twelve of the suits for failure to state claims and striking the allegations of retail price-fixing. The court dismissed the remaining case—the *Little Ranch* case—in February 1977. All the cases were dismissed with prejudice.

II

We address first the most important issue in these appeals: Did the district court err in dismissing the appellants' claims for damages?

A

We meet at the outset questions about the applicability of *Illinois Brick* to these actions. The appellants' first line of attack on the district court's decision is the bold argument that *Illinois Brick* simply has no application to these actions. They also urge that, assuming *Illinois Brick* is relevant, the decision cannot bar damage claims against the National Provisioner and the grocery chain trude association because neither is a buyer or seller of beef. In the interests of clarity, our assessment of these contentions will begin with a discussion of the background and rationale of the *Illinois Brick* decision.

The *Illinois Brick* rule barring damages actions against alleged price-fixers by indirect purchasers has its genesis in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 1968, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231. *Hanover Shoe* involved an antitrust treble-damages suit under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a lessee of the machinery. The plaintiff claimed damages arising from the defendant's practice of leasing, rather than selling, the machinery, a practice that the plaintiff contended was a violation of section 2 of the Sherman Act. The Supreme Court affirmed the trial court's refusal to permit the defendant to prove up the defense that any illegal overcharges imposed on the lessee shoe manufacturer had been passed on to that manufacturer's customers. The Court referred to a "general tendency in the law" not to trace damages "beyond the first step". 392 U.S. at 488 n.6, 88 S.Ct. 2224, n.6 (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 1918, 245 U.S. 531, 38 S.Ct. 186, 62 L.Ed. 451).[8] The Court rejected the defendant's argument that the general rule should admit of an exception when economic circumstances are such that the overcharge to the buyer both caused

[8] Before *Illinois Brick*, a strong case could have been made that the *Hanover Shoe* decision rested primarily on the Court's perception that the middleman, and not the remote purchaser, is the likeliest enforcer of the antitrust laws. Although it is probable that Hanover, like most middlemen, passed on much of the overcharge, recognition of a passing-on defense would have reduced the incentives for middlemen to sue. Professor Posner has observed: "The choice was thus between overcompensating Hanover and underdeterring United. The Court's preference for the former is consistent with the view that the primary purpose of antitrust damage actions is to deter violations of law." R. Posner, *Antitrust Cases, Economic Notes and Other Materials* 149 (1974). *See Illinois Brick*, 431 U.S. at 752-53, 97 S.Ct. 2061 (Brennan, J., dissenting).

In *Illinois Brick*, however, the Court observed that the *Hanover Shoe* decision rested primarily on the difficulty-of-proof problem, and not on the deterrence rationale. *Illinois Brick*, 431 U.S. at 732 n. 12, 97 S.Ct. 2061 n. 12.

and enabled the buyer to pass on the full overcharge to his customers. The impact of the overcharge on the buyer's pricing decisions, said the Court, cannot be demonstrated with any precision in the ordinary case. 392 U.S. at 492-93,[9] 88 S.Ct. 2224. Recognition of a general passing-on defense would, in the Court's opinion, simply encourage defendants to attempt to establish its applicability, thus complicating and protracting many antitrust proceedings. *Id.* at 493, 88 S.Ct. 2224. The Court rejected the passing-on defense as a general matter and expressed its view that the defense should be permitted only in certain narrow circumstances when the concerns underlying its rejection in *Hanover Shoe* were not present. *Id.* at 494, 88 S.Ct. 2224.

Hanover Shoe barred defensive passing-on, the use of passing-on as a defense in an antitrust action. In *Illinois Brick*, the Court resolved a split of authority in the courts of appeals by ruling that, with few exceptions, indirect purchasers of an alleged price-fixer's product cannot maintain a treble damages action predicated on the offensive use of the theory that the price-fixer's over charge to his customer was passed on to the plaintiffs. The plaintiffs were separated from the price-fixing

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[9] Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in the company's price will have on its total sales. Finally costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued 392 U.S. at 492-93, 88 S.Ct. at 2231.

offenders by two intervening transactions: the bricks moved from the manufacturers through subcontractors and general contractors to the consumers, carrying a four-cent-per-brick overcharge each time the brick changed hands. The court decided that if *Hanover Shoe* were to be followed, offensive as well as defensive use of passing-on must be barred. The Court noted that recognition of a "one-sided" limitation on a passing-on theory of damages would lead to a "serious risk of multiple liability". If offensive use of passing-on were permitted, a price-fixer could be held liable to an indirect purchaser for the amount of the overcharge passed-on to that purchaser by the price-fixer's direct customer yet, lacking a passing-on defense (under *Hanover Shoe*), would be liable to the direct purchaser, his customer, for the full amount of the overcharge.[10] Further, the Court concluded that the rationale of *Hanover Shoe* had not depended on the defensive context in which passing-on was asserted in that case. The "uncertainties and difficulties in analyzing price and out-put decisions" in the real world, 431 U.S. at 731-32, 97 S.Ct. at 2068, the "principal basis" for the *Hanover Shoe* holding, *id.* at 731, 97 S.Ct. 2061, counseled rejection of offensive passing-on as well. Those same "evidentiary complexities and uncertainties"

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[10] A serious risk of overlapping liability would remain even under a rule permitting the offensive use of passing-on only in situations in which the defendant could use a passing-on defense, unless the scope of passing-on were narrowly restricted to cases in which the incidence of overcharges could be established with certainty. That risk would arise from the risk of inconsistent factfindings in separate lawsuits by direct and indirect purchasers. Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L. Rev. 309, 319 n.43 (1978). The magnitude of that risk would vary directly with the speculativeness of the proof of the incidence of the overcharge. By narrowly limiting the use of passing-on to cases in which the overcharge can be traced with ease and certainty, see part II, B of this opinion below, the Supreme Court has all but eliminated this risk of duplicative liability.

and undesirable delays would attend the effort of indirect purchasers to establish that illegal overcharges were passed on to them. *Id.* at 732, 97 S.Ct. 2061. The Court decided, therefore, that the passing-on theory of damages must be barred in those situations in which the defendant could not assert a passing-on defense against his direct purchasers. *Id.* at 735-36, 97 S.Ct. 2061.

[1] Because *Illinois Brick* adopted a unified "mutuality" approach to passing-on problems we must reject the appellants' argument that *Illinois Brick* has no application to these suits insofar as they seek relief for violations of Section 2 of the Sherman Act. Under *Illinois Brick*, the plaintiffs would be entitled to urge a pass-on theory of damages only if the defendant retail chains could use a passing-on defense to claims brought by the packers and slaughterers. Whether the plaintiffs can proceed on a passing-on theory of damages is, applying the mutuality principal, a question unaffected by their denomination of the claim. Absent exceptional circumstances, *Illinois Brick* and *Hanover Shoe* limit the use of passing-on theory in antitrust actions without regard to the parties' characterization of the offense.

The appellants' most ambitious contention is that *Illinois Brick* is entirely inapposite to price-fixing suits brought by sellers against indirect purchasers. They point out that *Illinois Brick* involved purchasers who charged price-fixing by a remote seller and contend that *Illinois Brick* should be limited to that type of case because the harm suffered by sellers in cases such as this one is much greater than the harm suffered by indirect purchasers in the paradigmatic *Illinois Brick*-type case. Especially is this so, they urge, when, as here, the alleged price-fixing conspiracy stands like a tollgate athwart the powerful "middle position" in the beef marketing system. The cattlemen's argument, we take it, is that the serious harm flow-

ing from monopsony or oligopsony price-fixing at a middle tier in an industry's structure outweighs the considerations, avoidance of overlapping liability and concern about complexities and uncertainties of proof, that underlay *Illinois Brick*—concerns that the Court may have overemphasized. *See* The Supreme Court, 1976 Term, 91 Harv. L.Rev. 70, 221-31 (1977).

The first step in assessing this argument is to examine the claim that the harm engendered by monopsony or oligopsony pricing of the kind alleged is, as a categorical matter, greater than that engendered by monopoly pricing. We focus first on monopsony or oligopsony pricing in general, without regard to the position occupied by the price-fixing combination in the productive chain. On this point, the appellants' contentions center on the harm suffered by the competitors themselves—the sellers. In the case of monopoly price-fixing, they say, the damaged buyer has a choice: he can refuse to buy the affected product and buy, instead, a substitute. In the monopsony or oligopsony price-fixing case, however, the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all. In their case, say the cattlemen, this means destroying fat cattle or, in the long run, cutting back production or going out of business.

We might acknowledge the difference as a general matter, but we have no reason to believe that the damage caused by the typical monopsony or oligopsony price-fixing scheme is significantly greater than that caused by the usual seller price-fixing scheme. Both types of price-fixing are attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses.[11] The appellants argue that

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[11] *See generally* J. Hibdon, *Price and Welfare Theory* 244-53 (Monopoly pricing); 264-67 (Monopsony) (1969); K. George & J. Shorey, *The Allocation of Resources* 150-52 (1978).

the reallocation process in the monopsony price-fixing case is inherently more likely than in the monopoly price-fixing case to cause business failures.[12] Assuming this to be true, *arguendo*, we do not think that this distinction is sufficient to warrant disparate treatment of monopoly and oligopsony for purposes of pass-on problems. If the *Illinois Brick* decision is grounded on a balancing of the deterrence and compensation policies of the treble-damages action against considerations of judicial economy and fairness to defendants—a view of *Illinois Brick* that is crucial to the appellants' argument[13]

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[12] In the case of monopoly price-fixing, the price-fixing generally raises the price of all goods that incorporate the product subject to the price-fixing. If the conspirators sell directly to the consuming public, the only businesses adversely affected are those in industries that supply complementary goods. If the conspirators do not sell directly to the consuming public, then the product is but an input in the production of other goods or services. By raising the cost of that input, the price-fixing conspiracy might conceivably have the effect of driving marginal firms that use the input out of the market. The likelihood of this occurring depends upon the magnitude of the cost of the input relative to the purchasing firm's total costs of production and on the elasticity of demand for the firm's product. A fifteen percent rise in the cost of beef, for example, threatens the profitability of a steakhouse far more than that of a grocery store. The impact will be greatest in the rare case of a firm that simply buys and resells only the good affected by the price-fixing conspiracy.

Most firms that sell directly to the typical monopsony or oligopsony price-fixing conspiracy, however, are in a position analogous to that of the single-product distributor who purchases his product from price-fixing conspirators. The good affected by the price-fixing conspiracy is likely to be the seller's only product or to represent a significant percentage of the seller's output. In general, the impact on a firm's revenues of a purchaser price-fixing scheme aimed at the product it sells is greater than the impact on a firm's costs of a monopoly price-fixing scheme affecting an input into the firm's product.

[13] If *Illinois Brick* did not involve such a balancing, even implicitly, then the appellants' argument that the greater harm flowing from purchaser, as compared with seller, price-fixing, justifies special treatment of passing-on problems in monopsony cases loses its premise. Formally, at least, *Illinois Brick* involved no such balancing as suggested in the text. The *Illinois Brick* holding is essentially the rule of mutuality. That rule was justified almost entirely by reference to the problem of overlapping liability, and the Court's focus on the risk of overlapping liability was a result

—it seems to us that the Supreme Court chose to permit entire price-fixing schemes, in some circumstances, to go unremedied by private damage actions. If the Court felt that competing considerations outweigh the costs of leaving unremedied the totality of harm flowing from some monopoly price-fixing schemes, we find it difficult to believe that the incremental harm, in the form of possible business failures, that might flow from unremedied monopsony or oligopsony price-fixing schemes would tip the Court's balance in favor of enforcement in the purchaser price-fixing case. The increment is too insignificant in comparison with the total damage caused by price-fixing.

The appellants urge that the Supreme Court has recognized that conspiracies aimed at sellers are especially abhorrent. None of the cases they cite, however, establish anything more than the unsurprising proposition that producers damaged by anti-competitive schemes have a remedy under the antitrust laws.[14] As support for their contention that conspiracies at the strategic middle position or "bottleneck" in an industry's structure are especially disfavored, they cite the Supreme Court's decisions in *American Tabacco Co. v. United States,*

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of its assumption that direct purchasers, as well as indirect, would likely sue the price-fixers. On the surface of it then, *Illinois Brick* does not acknowledge that its pass-on rule involves any significant sacrifice of antitrust enforcement: in those cases in which the rule bars indirect purchasers from suing, the direct purchasers, it is assumed, will likely come to the fore.

[14] *E.g., Zenith Radio Corp. v. Hazeltine Research, Inc.,* 1969, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129; *Continental Ore v. Union Carbide & Carton Co.,* 1962, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777; *Klor's Inc. v. Broadway Hale Stores, Inc.,* 1959, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741; *Mandeville Island Farms v. American Crystal Co.,* 1948, 334 U.S. 219, 68 S.Ct. 996, 92 L.Ed. 1328. The cases cited by the appellants, with the exception of *Mandeville Island Farms,* were cases involving monopolization or exclusionary practices, not price-fixing. None involved passing-on theories of damage.

1946, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575, and *Standard Oil Co. of New Jersey v. United States*, 1191 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619. Those decisions, it is true, recognize the seriousness of monopsony or oligopsony at the dominant middle of an important industry's productive chain, but they do not single out that situation for special treatment under antitrust laws. We cannot carve from an important antitrust rule intended to be of general application exceptions based on the sheer magnitude or impact of the particular conspiracy alleged.

[2] We conclude that there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases.

A final issue as to the applicability of the *Illinois Brick* rule concerns the appellants' cases against the National Provisioner and the National Association of Food Chains. The appellants argue that the *Hanover Shoe-Illinois Brick* limitations on the use of passing-on theory apply only to suits brought against firms that are in the chain of production. They theorize that the "central rationale" of the *Hanover Shoe* and *Illinois Brick* decisions is that firms dealing directly with the alleged price-fixer are likelier than firms remote in the productive chain to sue and that severe limitations on the use of passing-on theory are necessary lest direct-dealing firms be discouraged from bringing suit. Because the trade publication and the trade association do not buy or sell beef at all, the argument continues, there are no firms in the beef marketing system that deal directly with these defendants. The cattlemen, the appellants conclude, are as likely as anyone to bring suit against those defendants.

[3] The argument rests on a faulty premise. The *Illinois Brick* decision rested on avoidance of overlapping liability and on concern about the complexities and uncertainties of proof that would attend general recognition of passing on theories of damage. What is critical is not whether a defendant competes in the relevant industry but whether the plaintiff's action (or the defendant's defense) asserts a form of passing-on theory. The complaints in these cases do so. The National Provisioner and the National Association of Retail Chains do not buy or sell beef but the appellants' complaints charge that they conspired with firms that do buy beef to fix the purchase price of boxed and carcass beef. That the trade publication and trade association defendants do not market beef does not diminish the problems of overlapping liability and uncertainty of proof posed by the use of a passing-on theory of damages. The doctrine of *Illinois Brick* therefore applies to the complaints against these two defendants.

B

Having determined that the *Hanover Shoe-Illinois Brick* doctrine applies to the damages claims in their entirety we turn to the appellants' contentions that these actions fit recognized exceptions to the bar against use of passing-on theory.

1. The Co-Conspirator Exception.

Certain of the appellants contend that the complaints in these actions, liberally construed, allege a conspiracy between the retail chains, on the one hand, and the packers and slaughterers on the other.[15] They argue for an exception from the

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[15] Indeed, many of the allegations strongly suggest that all the non-defendant co-conspirators adverted to in the complaints are food retailers. Paragraph 34 of the MPIA Amended and Substituted Complaint, for example, states in part:

> b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts

Illinois Brick rule for cases involving a conspiracy between the remote price-fixers and the direct-dealing intermediary.

They argue, first, that cases involving conspiracy spanning two levels in the chain of distribution fit the exception recognized in *Illinois Brick* for cases in which the defendant owned or controlled its customer (the middleman). *Illinois Brick*, 431 U.S. at 736 n.16, 97 S.Ct. 2061 n.16.[16] If the retail chains conspired with the packers and slaughterers, they urge, the retailer can be said to have "controlled" the middleman within the meaning of footnote 16 of *Illinois Brick*. Market forces would have been superseded in such circumstances. There would then be no indirect dealing problem, it is argued, since those selling to the packers and slaughterers would have dealt directly with the price-fixing conspiracy.

Even if proof of a multilevel conspiracy would not bring the case within the "control" exception recognized in *Illinois*

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thereof have varied . . . thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas . . . .

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale . . . .

e. . . . Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the 'Safeway price,' and which prices are directly passed on to the beef producer.

[16] "Another situation in which market losses have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 599 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191 [at] 197, 199." But "reliance upon direct purchasers to bring suit is wholly unjustified when they are controlled by the prospective defendants". The Supreme Court, 1976, 91 Harv.L.Rev. 70, 230 (1977).

Brick, it is urged, we should recognize a distinct exception for vertical conspiracies. The appellants argue that the defendants remote from the plaintiffs in the chain of distribution do not run the risk of double liability if it is proved that the intermediary was an equal participant in the price-fixing conspiracy, for the co-conspirator intermediary could not recover in a suit against the remote seller or purchaser. This is so, they say, because "when parties of substantially equal economic strength mutually participate in the formation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other". *Columbia Nitrogen Corp. v. Royster Co.*, 4 Cir. 1971, 451 F.2d 3, 15. *See also Premier Electrical Constr. Co. v. Miller-Davis Co.*, 7 Cir. 1970, 422 F.2d 1132, *cert. denied*, 1970, 400 U.S. 828, 91 S.Ct. 56, 27 L.Ed.2d 58.

As the appellees point out, however, the co-conspiracy theory now urged by the plaintiffs-appellants was not set forth in the complaints. The theory of the complaints, both before and after the *Illinois Brick* decision, was that the defendants conspired to fix the prices paid to packers and that the packers simply "passed on" the price depression to cattlemen. Certain allegations in the complaints refer to unnamed co-conspirators, and the appellants now contend that the packers and slaughterers are included among those unnamed co-conspirators. Various paragraphs in the complaints refer to the unnamed co-conspirators as nondefendant food retailers. Nothing in the complaints, however, suggests that packers or other intermediaries conspired with the defendants. In their joint reply brief the appellants cite paragraph 34 of the *MPIA* and *Becker* Amended Complaints as an example of a

packer conspiracy allegation.[17] That paragraph, however, states merely that most slaughterers and packers have standing agreements with the defendant chain stores to supply fixed quantities of beef each week, and that the Yellow Sheet or "Safeway" price paid the packer sets the price that the packers pay the plaintiffs for their cattle. This is merely an allegation of passing-on, not of conspiracy. No agreement to fix prices is alleged. If the act of passing-on sufficed to brand the intermediary as a co-conspirator the asserted exception would wholly swallow the *Hanover Shoe-Illionis Brick,* rule.

[4] The appellants urge that the district court abused its discretion by failing to give them adequate opportunity to amend their complaints, after the *Illinois Brick* decision, to allege a vertical conspiracy, and by denying post-judgment requests for leave to amend. We do not agree.

[15] Leave to amend pleadings should be granted liberally when previously unimportant factual issues gain significance as the result of rulings on a point of law handed down during the pendency of the litigation. *E.g., Commissioner of Internal Revenue v. Estate of Donnell,* 5 Cir. 1969, 417 F.2d 106. In none of these cases, however did the district court before the entry of its dismissal order deny the plaintiffs leave to amend their complaints in light of *Illinois Brick.* And all plaintiffs had a reasonable opportunity to amend before the district court ruled on the defendants' dismissal motions. Those mo-

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[17] That paragraph states:

> Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway Price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

tions, based on *Illinois Brick*, were filed on July 17, 1977, eight days after the Supreme Court's decision. The district court did not rule on the motions until October, 1977. In three of the suits, the *MPIA*, *Becker*, and *Petersen* suits, the complaints were amended, with leave of court, after the filing of the defendants' motions to dismiss. None of those complaints, however, adequately alleged conspiracy. The plaintiffs in the remaining suits stood on the allegations of their complaints, asserting that the "unnamed" co-conspirators mentioned therein were indeed packers and slaughterers. Following the court's communication of its decision to the parties, an attorney for one of the plaintiffs requested that the dismissal be "without prejudice", but none of the plaintiffs attempted to amend the complaints until the *Black* and *Pony Creek* plaintiffs, *after* the court's December 9 entry of its order dismissing the suits with prejudice, filed motions for leave to amend.

The district court did not abuse its discretion in denying the post-judgment motions for leave to amend. Rule 15(a) of the Federal Rules of Civil Procedure requires that leave to amend be freely granted "when justice so requires". The Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis*, 1962, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222. The plaintiffs have offered no credible explanation for their failure to move for leave to amend until nearly five months after the defendants moved for dismissal on the basis of *Illinois Brick*.[18] Absent any apparent justification for this delay, we cannot hold that the district court abused its discretion. We emphasize, moreover, that these motions were made after the court's entry of the dismissal orders

[18] The only explanation given is the *Chapparal* plaintiffs' lame assertion that it took a long time to divine the meaning and implications of the *Illinois Brick* decision.

and after the movants had, in their legal memoranda in support of their opposition to the motion to dismiss, asserted that they stood, in regard to the co-conspiracy issue, on the allegations of their existing complaints. The plaintiffs tested the theory that their embellished allegations of passing-on were equivalent to allegations of packer complicity in the price-fixing conspiracy and lost. We have said before that

> [m]uch of the value of summary judgment procedure . . . would be dissipated if a party were free to rely on one theory in an attempt to defeat a motion for summary judgment and then, should the theory prove unsound, come back long thereafter and fight on the basis of some other theory.

Freeman v. Continental Gin Co., 5 Cir. 1967, 381 F.2d 459, 469-70.

The Supreme Court in *Foman* also declared that denial of leave to amend is proper when the proposed amendment would be futile. *Foman v. Davis, supra*, 371 U.S. at 182, 83 S.Ct. 227. The district court's denial of the post-judgment motions was supportable on this ground as well. Amendment of the complaints to allege a vertical conspiracy would not have brought these actions within the "control" exception in *Illinois Brick*. In footnote 16 of *Illinois Brick* the Court suggested the intended scope of the "control" exception by citing the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases*, 1973, 487 F.2d 191, *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474. In that case there was evidence tending to show that the defendants controlled their direct customers "either through acquisition of stock, or indirectly through various financial arrangements, including credit". *Id.* at 195. It has been suggested that "courts should invoke the exception only to ensure that sellers do not insulate themselves from suit . . .

by strongarming direct purchasers into choosing not to sue". Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 328-29 (1978). The plaintiffs in these suits have never suggested that the grocery chains "controlled" the packers or slaughterhouses, either through stock ownership or credit arrangements. Indeed, the plaintiffs proposed to amend their complaints to allege a vertical conspiracy, not to allege arrangements by which the defendants controlled the packers and slaughterhouses.

Nor did we think that allegations of conspiracy would bring these cases within an exception for suits alleging vertical conspiracy. It is true that some courts have acknowledged such an exception. *E.g., Florida Power Corp. v. Granlund*, M.D. Fla., 1978, 78 F.R.D. 441; *Donson Stores, Inc. v. American Bakeries Co.*, S.D.N.Y., 1973, 58 F.R.D. 481. Whatever the merits of the arguments for such an exception in general, we do not think that the reasoning of *Illinois Brick* permits recognizing the exception when, as here, the alleged co-conspirator middlemen are not named as parties defendant. Absent joinder of the packers and slaughterhouses, the rule forbidding one antitrust conspirator from maintaining an action against another for damages arising from the joint activity would not protect these defendants from the risk of overlapping liability. The retail chains could not, in a suit brought by the packers, use a judgment or finding of vertical conspiracy in the instant case to prevent the packers from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages from the retail chains. *E.g., Mosher Steel Corp. v. N. L. R. B.*, 5 Cir. 1978, 568 F.2d 436. Because the packers are not parties to this suit, the possibility

of inconsistent adjudications on the issue of the existence of a vertical conspiracy leaves the defendants subject to the risk of multiple liability that the *Illinois Brick* Court found unacceptable.

For these reasons we uphold the district court's refusal to permit post-judgment amendments to the complaints.

2. The "Cost-Plus" Exception.

The appellants urge that outright dismissal of their damage claims was error because the complaints stated good claims within the "cost-plus contract" exception in *Illinois Brick.*

The Supreme Court acknowledged in *Hanover Shoe* "that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—when the considerations requiring that the passing-on defense not be permitted in this case would not be present". 392 U.S. at 494, 88 S.Ct. at 2232. The Court in *Hanover Shoe* seemed to suggest a general exception to the bar against assertion of a passing-on defense, an exception defined by the policies underlying the bar. Cases in which the middleman's customer is obligated under a preexisting cost-plus contract to purchase a fixed quantity of goods are paradigmatic of this exception. The proof—the contract itself and evidence of its performance—is simple and unequivocal.[19] Uncertainties of proof are thus

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[19] In *Hanover Shoe* the Court emphasized the inadequacy of economic theory to the task of tracing the incidence of an overcharge. *See* note 7, *supra.* In *Illinois Brick* the Court elaborated on the point. The Court noted that economic theory provides a formula for determining the incidence of an overcharge, but that the analysis rests on "an array of simplifying assumptions" and assumes knowledge of elasticities of supply and demand in the relevant market. 431 U.S. at 741-42, 97 S.Ct. 2061. The unacceptability of the assumptions and the near-impossibility of measuring the relevant elasticities renders such incidence analysis little more than a guessing game in practice, the Court seemed to suggest. The Court was concerned not so much with the complexity of such proof as with its speculative character.

avoided. The risk of overlapping liability is eliminated or reduced to the barest minimum inasmuch as the evidence is not susceptible of differing interpretations and is unlikely to be accepted in one lawsuit and rejected in another.

As we understand these cases, the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are the functional equivalent of the cost-plus contract case. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1454-57 (1978). "Although the Court intended the exception to have a 'narrow scope', any situation in which [the impact of] the overcharge is essentially determined in advance 'without reference to the interactions of supply and demand' would function in the same way." Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornell L.Rev. 309, 331 n.93 (1978) [citations omitted]. When the impact of an overcharge on a middleman's pricing decisions can be so determined, the uncertainties involved in resorting to general economic theorems are avoided and the clarity of the evidence virtually eliminates the possibility of overlapping liabilities as the result of inconsistent verdicts in separate lawsuits. Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers.[20] In the cost-plus

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[20] In *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir., 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540, a panel of this Court reversed a treble damages judgment that was erroneously reduced by recognition at trial of a passing-on defense. The Court ruled that the defense was not available because the evidence of the party asserting the defense did not demonstrate the applicability of the cost-plus exception suggested

contract case itself, the middleman is likely to have suffered a loss of volume and hence profits as a result of the over-

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in *Hanover Shoe*. The Court found that the evidence did not show the effect of a price change on the direct purchaser's total sales or unit costs for a different sales volume. Under the rule of *Yoder Bros.*, the passing-on defense is unavailable absent evidence that the direct purchaser did not suffer harm in the form of lost sales volume, even if it is proved that the direct purchaser passed on the entirety of the overcharge.

Application of the *Illinois Brick* mutuality principle would suggest that, because under *Yoder Bros.* these defendants could not assert a passing-on defense at all in a treble damages suit brought by the packers and slaughterers absent proof that the packers and slaughterers suffered no loss of volume as a result of the alleged price-fixing, the cattlemen should be barred from using passing-on theory offensively against the defendants unless they demonstrate that the packers and slaughterers suffered no loss of volume. If this is so, then the bar against use of passing-on is absolute, for it would be impossible, not simply "virtually" impossible, to make such a showing. Indeed, *Yoder Bros.* has the effect of eliminating the passing-on defense altogether, except perhaps in the very narrow case of a pre-existing, fixed quantity cost-plus contract.

We do not believe, however, that the *Yoder Bros.* Court's treatment of the pass-on issue is viable after *Illinois Brick*. The *Yoder Bros.* Court's very literal reading of *Hanover Shoe* to require parties asserting a pass-on defense to prove that the intermediary suffered no harm whatsoever rested, we think, on its view that the private treble damage action is of "overriding importance . . . in the antitrust enforcement scheme." *Id.* at 1375. Indeed, *Hanover Shoe* was plausibly read, before *Illinois Brick*, as resting on the view that the strong policy in favor of antitrust enforcement justifies buying enforcement at the expense of overcompensating plaintiffs. *See* note 6 *supra*. In *Illinois Brick*, however, the Court denigrated the importance of the antitrust enforcement rationale in the decision of *Hanover Shoe* and characterized the difficulty-of-proof problem as the key to *Hanover Shoe*. 431 U.S. at 732 n.12, 97 S.Ct. 2061 n.12. Indeed, *Illinois Brick* itself demonstrated that the policy in favor of vigorous antitrust enforcement must sometimes give way in face of the risk of overpunishing antitrust violators. The *Yoder Bros.* panel would not have taken so niggardly a view of the passing-on defense had it had the benefit of the *Illinois Brick* Court's interpretation of the *Hanover Shoe* opinion, or had it known the implications that its decision might have for antitrust plaintiffs after *Illinois Brick*.

Post-*Illinois Brick* commentary, moreover, has generally assumed that the issue of the impact on the direct purchaser's sales volume of an overcharge should not be dispositive in a case involving the offensive use of passing-on theory. *E.g.*, Note, *Recovery by Indirect Purchasers and the Functions of Antitrust Treble Damages*, 55 Texas L.Rev. 1445, 1455 n.69 (1977). *See also*, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 Cornel L.Rev. 309, 329 n.87 (1978).

charge. His higher selling price will likely have caused potential customers to forego his product. *See* Note, 63 Cornell L. Rev. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.

[6] Applying these principles, we conclude that the district court erred in dismissing these actions. The dismissal, we emphasize, was on the pleadings. The question at the pleading stage is simply whether the allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae[21] would enable measurement of the effect on prices for

[21] Because these cases come up on appeal from dismissals on the pleadings, we are not concerned with the question whether packers and slaughterers in fact applied pricing formulae without deviation, or with the question whether the formulae employed were such that a change in wholesale prices in a given region had a predetermined effect on the price offered feeders in the region by the packers and the slaughterers. We must assume, for purposes of these appeals, that the plaintiffs could demonstrate that both quesions are to be answered in the affirmative.

fat cattle of changes in wholesale prices.[22] The plaintiffs have alleged the functional equivalent of cost-plus contracts.

We do not agree with the appellees that the packer pricing mechanism alleged is exactly analogous to the "fixed percentage markup" or cost-based pricing systems rejected by the *Illinois Brick* Court as exceptions to the passing-on rule. In *Illinois Brick* the Court refused to recognize an exception where middlemen "purport" to charge a fixed percentage markup. 431 U.S. at 743, 97 S.Ct. 2061. Here it is alleged that the packers *in fact* engaged in formula pricing. The Court in *Illinois Brick* was skeptical of the plaintiffs' claims because there is evidence that firms purporting to apply fixed markups above costs in fact fit the markup to the elasticity of demand for the product or juggle cost allocations to achieve the same result. F. Scherer, *Industrial Market Structure and Economic Performance* 176 (1970). An intermediary, such as a contractor in *Illinois Brick*, who employs numerous inputs in assembling his final product might bear the larger brunt of an increase in the price of one of his inputs without leaving any evidence that he did so. It is alleged that the intermediaries in these cases determine their purchase price for fat cattle by rigid application of formulae to the wholesale price for carcass beef. Assuming the allegations of the com-

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[22] In *Hanover Shoe* the Court pointed out that in attempting to prove a pass-on a litigant would have to demonstrate that the intermediary would not have raised his price absent the overcharge. 392 U.S. at 493 and n.9, 88 S.Ct. 2224 and n.9. This is a causation issue. The Court's general rejection of the use of passing-on theory rested in part on its view that this issue of causation could not, except in rare cases, be resolved with adequate certainty. *See* note 17 *supra*. If, however, an intermediary over a long period of time consistently determines his purchase price by applying a fixed formula to the price he will receive when he in turn sells, the objection based on the speculativeness of the causation evidence disappears. Our legal system routinely permits triers of fact, as indeed it must, to infer causation, or the lack of causation, from the observation of deviation *vel non* from long-indulged habit or practice.

plaints to be true, a packer's absorption of a loss resulting directly from a decrease in the wholesale price would be detectable from a change in his purchasing formulae or from his paying a price for fat cattle that is above the price he would have paid had he adhered to his customary formulae. It is alleged, moreover, that the packers have no reason to depart from their purchasing formulae in the short run because short term supply is, by the very nature of cattle production, highly inelastic.

We recognize that it might be said that we are engaging in "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum". *See Illinois Brick*, 431 U.S. at 744-45, 97 S.Ct. at 2074. But the Supreme Court itself engaged in such a process in suggesting exceptions to its bar against the use of passing-on theories. If allegations of structural inelasticity of short term supply and of rigid formula pricing by intermediaries do not bring a case within the cost-plus exception for purposes of a motion to dismiss on the pleadings, then the cost-plus exception is a narrow one indeed, and must include only cases involving literal cost-plus contracts.[23] In light of the purposes behind the passing-on bar—preventing duplicative recoveries and avoiding the uncertainties involved in the use of incidence theory—the situation alleged in these complaints is the functional equivalent of the cost-plus contract case.

[7] The appellees are correct in asserting that the proposed proof of damages is far from simple. It will require detailed proof as to individual transactions. Attention must focus on the type and grade of cattle sold, and on whether (and which) pricing formulae were used by packers in mak-

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[23] That view was recently taken by the Third Circuit Court of Appeals in *Mid-West Paper Products Co. v. Continental Groups, Inc.*, 596 F.2d 573 (1979), *as amended* April 5, 1979.

ing particular purchases. The proof must be detailed and particular. But this is a complexity born of quantity. The *kinds* of proof that will be involved, however, are not new to courts, and certainly not to antitrust courts. The cases as pleaded escape *Illinois Brick* only insofar as they avoid the use of general economic theory in tracing the effect of the defendants' price decisions, and only insofar as they can be proved, in the damages phase, with certainty. If, as to a particular transaction, it cannot be clearly shown that the purcashing packer applied a specific price formula, or if other details of a transaction, such as the quantity or grade of cattle, are not available, then the plaintiff cannot recover damages as to that sale.[24]

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[24] The appellees have suggested that the plaintiffs will have to trace their cattle through the chain of production to establish that the cattle they sold to packers and slaughterhouses were in turn sold, in carcass form, to members of the alleged retail chain conspiracy. If the prices allegedly established by the defendants were uniformly followed by the beef retailing industry, as the plaintiffs allege, however, tracing would be unnecessary. The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly, is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

We disagree with the recent ruling of a divided panel of the Third Circuit Court of Appeals that one who deals with a nonconspiring competitor of price-fixing firms lacks standing to sue those firms for treble damages. *See Mid-West Paper Products Co. v. Continental Group, Inc., supra* note 23, 596 F.2d 587. That decision supports the appellees' contention, for if a person who deals directly with a nonconspiring competitor lacks standing, then an indirect purchaser from, or an indirect seller to, a nonconspiring competitor of the defendants *a fortiori* lacks standing. We agree with the dissent in *Mid-West Paper Products* that such a plaintiff satisifies the "target area" test for standing, *see* Part IV below, and that the injury suffered by such a plaintiff satisfies the tests for proximate causation. *See* 596 F.2d at 597.

We reverse the district court's dismissal orders. Because the pleadings state a case within the cost-plus exception. We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages. Nor does our ruling imply that the plaintiffs may attempt to trace damages beyond the tier comprised of those who sell directly to the packers or slaughterers. Under the allegations of the complaint only those plaintiffs who sold directly to the packers or slaughterers that engaged in strict formula buying are entitled to maintain damage claims. The complaints do not allege that feeders or brokers "passed on" price depressions to ranchers or that they engaged in strict formula buying based solely on Yellow Sheet prices.

III.

The appellants also appeal the dismissal of their claims for injunctive relief on the basis of *Illinois Brick*. It follows from our ruling that it was error to dismiss the damage claims on the pleadings that it was also error to dismiss the claims for injunctive relief on the pleadings. Our disposition of the injunctive relief issue, however, rests on the broader ground that the *Illinois Brick* rule has no application to claims for injunctive relief.

[8] We agree with the reasoning of *Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 3 Cir. 1979, 596 F.2d

573, *as amended* April 5, 1979. The court in that case ruled that *Illinois Brick* does not bar suits for injunctive relief by indirect purchasers in price-fixing actions because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief. An injunctive suit does not expose a defendant to monetary liability at all, much less to the risk of duplicative liability, and does not require the trier of fact to determine the incidence of the overcharge. To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws". 15 U.S.C. § 26. To show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their cattle, or that the conspirary reduced the packers' demand for fat cattle.

The appellees argue that injunctive relief is barred to indirect sellers or purchasers whose damage claims are barred by *Illinois Brick* because *Illinois Brick* holds that such persons are not injured within the meaning of section 4 of the Clayton Act. Section 4 and section 16, they point out, are coextensive except that section 16, unlike section 4, does not require an injury to the plaintiff's "business or property". It therefore follows, it is urged, that indirect sellers or purchasers barred from section 4 treble damages by the *Illinois Brick* rule are not threatened with legally cognizable injury within the meaning of section 16.

We disagree with the appellees' characterization of the *Illinois Brick* decision. Formally, it is true, both *Hanover Shoe* and *Illinois Brick* held that, with the exceptions previously discussed, the overcharged direct purchaser, and not the indi-

rect purchaser who may ultimately bear part of the overcharge, suffers the full injury for purposes of section 4. Had those decisions even purported to rest on a divination of the original meaning of section 4 of the Act we would agree with the appellees that *Illinois Brick* has clear implications for injunctive actions under section 16 as well. But neither *Hanover Shoe* nor *Illinois Brick* involved statutory construction in the ordinary sense. They are judicial glosses on an old statute, predicated on contemporary policy considerations. The implications of those decisions therefore reach only as far as the policy considerations informing them.

IV.

In its December 1977 order dismissing the actions, the district court granted the defendants' motion to strike allegations of retail price-fixing from the complaints. Those allegations charged the retail chains with conspiring to set artificially high prices for beef sold to retail consumers. The plaintiffs in all the suits appeal that action.

[9] It was error to strike the allegations of retail price-fixing in the *Agee* and *Varian* complaints.[25] These complaints allege that some of the plaintiffs have purchased beef as consumers at prices affected by the alleged conspiracy. Such an allegation is an adequate allegation of the injury to one's "property" within the meaning of section 4 of the Clayton Act. *Reiter v. Sonotone Corp.*, —— U.S. ——, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979). That the allegations might have been added to the complaint in the effort to inject highly prejudicial matter into a lawsuit that is primarily based on wholesale price-fixing, as the appellees charge, is of no consequence,

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[25] The *Agee* suit has been restyled *Shoshone Tribe of Duckwater, et al. v. Safeway Stores, Inc., et al.* We follow the parties' practice of referring to the case as "*Agee*".

for Rule 18(a) of the Federal Rules of Civil Procedure grants the plaintiffs complete freedom to join in a single action all claims that they may have against any of the defendants. 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1582 (1971).

It was not error, however, to strike the retail price-fixing allegations from the remaining complaints. With the exception of the *Agee* and *Varian* complaints, none of the complaints alleged injury to the plaintiffs' business or property within the meaning of the Clayton Act. The appellants contend that they have adequately alleged injury to their businesses. They say that they intend to prove, under their allegations, that the alleged retail price-fixing conspiracy reduced consumer demand for beef, thereby derivatively reducing the retailers' and the packers' demand for the plaintiffs' fat cattle.

[10, 11] The appellants, however, lack standing to sue for such remote injury. Only those within the "target area" of an alleged antitrust conspiracy have standing to sue. *E.g., Jeffrey v. Southwestern Bell*, 5 Cir. 1975, 518 F.2d 1129, 1131. The question of standing is a preliminary one, to be answered from examination of the allegations of the complaint. *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 5 Cir. 1976, 537 F.2d 1347, *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed. 2d 540. Looking to the complaints, we find allegation of retail purchases in only the *Agee* and *Varian* complaints. In the other complaints we find, at best, allegations under which the plaintiffs could show harm flowing derivatively from a reduction in consumer demand. The "target" of a retail price-fixing conspiracy, however, is the retail purchaser. *E.g., Kemp Pontiac-Cadillac, Inc. v. Hartford Automobile Dealers' Ass'n*, 1974, D.Conn., 380 F.Supp. 1382, 1386. To recognize the non-purchasing plaintiffs as "targets" of the alleged retail price-

fixing conspiracy would be to grant antitrust standing to firms and persons at every level in the chain of beef production and distribution. "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 1972, 405 U.S. 251, 263 n.14, 92 S.Ct. 885, 891-892, 31 L.Ed.2d 184. Only the *Varian* and *Agee* allegations satisfy the "target area" test for standing to sue.

Shifting ground, the appellants argue that evidence of the alleged retail price-fixing conspiracy is highly relevant to their claims of monopolization and monopsony or oligopsony price-fixing at the wholesale level. The defendants' retail-level activities, they urge, are evidence of the defendants' monopoly power and proclivity to collude. Evidence of those activities is also essential, they contend, to painting for the jury a complete picture of the alleged conspiracy and of the industry in which it operates. They contend, in short, that they simply pleaded evidence.

[12-15] This is not the place or time to debate the relevance of the retail price-fixing evidence. The district court had ample discretion, under Rule 12(f) of the Federal Rules of Civil Procedure, to order stricken from the complaint any redundant or immaterial matter. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1382 at 807 (1969). Although unnecessary evidentiary details are usually not stricken from the complaint unless prejudicial or of no consequence to the controversy, *id.; see also Augustus v. Board of Public Instruction*, 5 Cir. 1962, 306 F.2d 862, evidence pleading, as distinguished from the pleading of ultimate facts, is not favored under the Federal Rules. *See* Rule 8(a) Fed.R. Civ.P.; 5 C. Wright and A. Miller, *supra*, at 832-33. Many courts have properly stricken unnecessary evidentiary detail from plead-

ings. *E.g., Control Data Corp. v. International Business Machines Corp.*, 8 Cir. 1970, 421 F.2d 323; *Commissioner of Internal Revenue v. Licavoli*, 6 Cir. 1958, 252 F.2d 268; *Mitchell v. Hart*, 1966, S.D.N.Y., 41 F.R.D. 138, 143. The district court's action will not be disturbed unless it was an abuse of discretion. *E.g., Commissioner of Internal Revenue v. Licavoli, supra*, at 272. We find here no abuse of discretion. Nor do we perceive how the plaintiffs have been harmed. The district court's order striking the pleadings does not control the issues of materiality and relevancy that govern admissibility of the evidence. *E. g., Control Data Corp. v. International Business Machines Corp., supra*, at 326-27. The plaintiffs need not plead these matters. *Schlick v. Penn-Dixie Cement Corp.*, 2 Cir. 1974, 507 F.2d 374, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1976, 44 L.Ed.2d 467. "If the trial court considers these matters proper proof upon the trial, he may admit them even through not pleaded." *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 1942, S.D.N.Y., 3 F.R.D. 157, 159.

V.

The plaintiffs in the *Pony Creek* action appeal the partial summary judgment entered against them on their claim that the defendants' fraudulent concealment of the alleged conspiracy tolled the four-year statute of limitations of section 4B of the Clayton Act. 15 U.S.C. § 15b.

[16, 17] The *Pony Creek* action was filed on June 5, 1975. Unless the statute of limitations was somehow tolled, the *Pony Creek* plaintiffs cannot recover for damages sustained prior to June 5, 1971. They allege in their complaint that they had failed to discover their cause of action before the June 1971 commencement of the limitations period because the defendants had fraudulently concealed it from them. Fraudulent con-

cealment tolls the Clayton Act's statute of limitations. *General Electric Co. v. City of San Antonio*, 5 Cir. 1964, 334 F.2d 480; *Rinzler v. Westinghouse Electric Corp.*, 5 Cir. 1964, 333 F.2d 719. To avail himself of this tolling doctrine, an antitrust plaintiff must show that the defendants concealed the conduct complained of, and that he failed, despite the exercise of due diligence on his part, to discover the facts that form the basis of his claim. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 4 Cir. 1976, 546 F.2d 570; *Dayco Corp. v. Firestone Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389.

The defendant Kroger Co. ("Kroger") moved for partial summary judgment on the fraudulent concealment claim. Kroger submitted with its motion evidentiary matter that, it contended, conclusively established that the plaintiffs had known, or would have known through the exercise of due diligence, of the existence of their claims before June 5, 1971. The evidence consisted of copies of numerous articles and reports published in the late 1960's in newspapers and cattle industry trade journals, together with an affidavit attesting to the authenticity of the copies. The articles and reports publicized the dissatisfaction of livestock producers with cattle prices, as well as the charges of many cattlemen that the retail chains were colluding to depress prices. Many of the articles reported the filing, in 1968, of *Bray, et al. v. Safeway Stores, et al.*, N.D.Cal., 392 F.Supp. 851 (1975) a lawsuit brought by several California cattlemen against major retail chains and which involved allegations essentially identical to those of the *Pony Creek* complaint. The defendants' exhibits showed that the allegations of the *Bray* complaint had received much publicity nationwide. The plaintiffs filed no counter-affidavits. They argued that the *Bray* lawsuit revealed no operative facts relating to their claim and that none were revealed until dis-

covery in the *Bray* suit during 1973 disclosed that some of the defendants had indeed discussed prices at trade association meetings.

Finding no genuine issue of material fact, and mindful of the suggestion in part 1.80 of the *Manual for Complex Litigation* that issues such as fraudulent concealment be determined as early as possible in complex litigation, so as to define the scope of discovery,[26] the district court granted the motion.

The *Manual's* salutary principle notwithstanding, the question of when the statute of limitations began to run on the plaintiffs' cause of action is a factual one, *e.g., Ciccarone v. United States*, 3 Cir. 1973, 486 F.2d 253, 256, and is therefore not determinable on a motion for summary judgment. The district court's task was simply to determine whether a genuine question was presented justifying trial, F.R.Civ.P. 56(c), as the court fully recognized. The defendants, as the moving parties, had the burden of demonstrating the absence of any genuine material issue of fact, and the plaintiffs had no obligation to present evidence opposing the motion unless the defendants' affidavit and exhibits initially established the absence of a genuine issue. *Advisory Committee Notes to the 1963 Amendments to Rule* 56, 31 F.R.D. 647, 648; *Adickes*

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[26] Part 1.80 states in relevant part:

> In some complex cases it becomes apparent at the preliminary pretrial conference or shortly thereafter that the determination of a legal question will expedite the disposition of the cause. This is particularly the case where the nature and scope of discovery and further pretrial proceedings would be substantially affected by the determination of the preliminary legal question. For example, in the electrical equipment civil antitrust cases the question whether fraudulent concealment would toll the running of the statute of limitations was one of the most important questions. It was very desirable to secure a determination of this question as early as possible, for if the statute was not tolled by fraudulent concealment, the discovery would be comparatively narrow in scope of time and a summary judgment on some or all issues could be rendered in many cases.

Manual for Complex Litigation 80 (1977).

Kress, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142. Kroger's evidentiary showing went entirely to the issues of the plaintiffs' actual or constructive knowledge of their cause of action. The question presented, then, is whether Kroger's showing established the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim.[27]

From the affidavit and exhibits it is abundantly clear that the plaintiffs knew or should have known in 1968 and 1969 of the allegations of the *Bray* complaint. The *Bray* case was widely publicized in numerous issues of numerous trade publications, including, as the district court noted, an issue of The American National Cattlemen's Association's weekly publication *Beef Business Bulletin*, which, according to the supporting affidavit, had at the relevant time a circulation of nearly 300,000. The *Bray* complaint itself was, of course, a matter of public record. It is of no moment that Kroger presented no direct evidence demonstrating that the plaintiffs were actually aware of the *Bray* case. Even assuming that the inferences of actual knowledge to be drawn from Kroger's presentation were insufficient for summary judgment purposes, the evidence was more than adequate to establish beyond doubt that reasonably diligent cattlemen in the plaintiffs' situation would have been aware, in the late 1960's, of the *Bray* allegations. Numerous federal courts have suggested that plaintiffs are chargeable with knowledge of the contents of public records. *E.g., Dayco Corp. v. Goodyear Tire & Rubber Co.*, 6 Cir. 1975, 523 F.2d 389, 394; *Morgan v. Koch*, 7 Cir. 1969, 419 F.2d 993, 998; *Overfield v. Pennroad Corp.*, 8 Cir. 1944, 146 F.2d

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[27] Kroger, of course, did not have to demonstrate the absence of triable fact issues as to the allegation that the defendants actively concealed the alleged conspiracy. If the defendants established that the plaintiffs knew or should have known of their cause of action before June 5, 1971, the running of the statute of limitations would not have been tolled even had the defendants affirmatively concealed the alleged scheme.

889, 898; *Pettibone v. Cook County*, 8 Cir. 1941, 120 F.2d 850, 855. In a case involving a claim that the statute of limitations has been tolled, "the means of knowledge are the same thing as knowledge itself." *Wood v. Carpenter*, 1879, 101 U.S. (11 Otto) 135, 143, 25 L.Ed. 807.

The plaintiffs' knowledge of the *Bray* complaint, however, is not *as a matter of law* tantamount to actual or constructive knowledge of their claim. Although the statute of limitations is not tolled simply because the plaintiffs lack much of the evidence supporting their potential claim, *Prather v. Neva Paperbacks, Inc.*, 5 Cir. 1971, 446 F.2d 338, they cannot have notice of a potential claim unless they are aware of some evidence tending to support it. The filing by others of a similar lawsuit against the same defendants may in some circumstances suffice to give notice, but to rule that it does so *as a matter of law* is to compel a person situated like these plaintiffs to file suit, on the pain of forfeiting his rights, regardless of whether his attorney believes that there is "good ground to support it." Rule 11, F.R.Civ.P. The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because that suit might well be frivolous or baseless.[28]

[18] The leap from the plaintiffs' knowledge of the *Bray* complaint to actual or constructive knowledge of their cause of action therefore involves factual issues. The defendants had the burden, as the moving parties, to demonstrate conclusively that the plaintiffs, through the exercise of reasonable diligence, would have discovered adequate ground for filing suit. The summary judgment evidence consisted only of a demonstration that the plaintiffs should have been aware of the *Bray* complaint. There is no evidence in the record suggest-

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[28] That the *Bray* plaintiffs eventually succeeded (in 1975) in their lawsuit is of no consequence, for the *Bray* action might have disclosed nothing about the alleged conspiracy before June 5, 1971.

ing that the *Bray* litigation turned up any verification for the allegations before June 5, 1971, or that the plaintiffs had independent access before that time to any information, beyond the *Bray* complaint itself, that tended to verify their suspicions. At best, the materials on file might support an inference that the plaintiffs would have discovered adequate support before June 1971 had they been reasonably diligent. The inference, however, is not so compelling as to entitle the defendants to summary judgment. Because the defendants failed to demonstrate the absence of genuine issues of fact the partial summary judgment must be reversed.

We should emphasize that this ruling is dictated by the posture of the question and the nature of the defendants' summary judgment showing. The plaintiffs bear the ultimate burden of persuasion on the fraudulent concealment issue. The burden is a heavy one. Those who have learned of facts "calculated to excite inquiry" must inquire. *Clement A. Evans & Co. v. McAlpine*, 5 Cir. 1970, 434 F.2d 100, 102, *cert. denied*, 402 U.S. 988, 91 S.Ct. 1660, 29 L.Ed.2d 153. The widely publicized *Bray* complaint certainly put these plaintiffs to a duty to investigate. They must demonstrate to the trier of fact that they investigated with reasonable diligence and discovered nothing that would have justified them in filing suit before June 5, 1971. *Id.*; *see also Dayco Corp. v. Goodyear Tire & Rubber Co.*, *supra*. In opposing the motion for summary judgment, however, the plaintiffs were not required to make any showing unless the defendants demonstrated that no genuine issues of fact underlay the due diligence question. This the defendants failed to do.

* * *

The judgments below are REVERSED and the cases REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
OFFICE OF THE CLERK
FIFTH CIRCUIT
GILBERT F. GANUCHEAU
Clerk
April 24, 1980
Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

To All Parties Listed Below:

Nos. 78-1817—78-1829—In Re BEEF INDUSTRY ANTITRUST LITIGATION, MDL DOCKET NO. 248

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEA
Clerk
By SALLY HAYWARD
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 78-1817—78-1829
(Consolidated)

Dist. Ct. Nos. CA-3-75-0702-C, CA-3-76-1237 & 1238-C, CA-3-76-1244-C, CA-3-76-1248-C, CA-3-76-1253 & 1254-C, CA-3-76-1470-C, CA-3-77-0360 thru 0362-C

In re BEEF INDUSTRY ANTITRUST LITIGATION,
MDL DOCKET
No. 248.

PONY CREEK CATTLE CO., INC., et al.,
Plaintiffs-Appellants,
MUSSELMAN RANCH CO., etc., et al.,
Plaintiffs-Internevors-Appellants,

vs.

THE GREAT ATLANTIC & PACIFIC TEA CO. et al.,
Defendants-Appellees.

R. DIRK AGEE et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS
ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,

vs.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RICHARD S. LOWE et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
A. I. BLACK, et al.,
Plaintiffs-Appellants.
vs.
ALBERTSON'S, INC., et al.,
Defendants-Appellees (two cases).
CHAPARRAL CATTLE CORP., et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
BURKE PETERSEN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
RONALD BECKER et al., on behalf of
themselves and all other persons
similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.
JOHN O. VARIAN et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS ASSOCIATION et al.,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.
LITTLE RANCH CO., INC., et al.,
Plaintiffs-Appellants,
vs.
THE NATIONAL ASSOCIATION OF FOOD CHAINS, etc., et al.,
Defendants-Appellees.

RONALD BECKER, et al., on behalf of themselves and all other persons similarly situated,
Plaintiffs-Appellants,
vs.
SAFEWAY STORES, INC., etc., et al.,
Defendants-Appellees.

Nos. 78-1817—78-1829.
Aug. 17, 1979

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before WIDSOM, HILL and FAY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, REVERSED and the cases REMANDED for further proceedings consistent with this Court's opinion;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, BLACK, ET. AL., MEAT PRICE INVESTIGATORS ASSOCIATIONS. ET. AL., and BECKER, ET. AL., VARIAN, ET. AL., CHAPARRAL CATTLE CORP., ET. AL. and PETERSEN, ET. AL., LITTLE RANCH CO., LOWE, ET. AL., and PONY CREEK, ET. AL., the costs on appeal to be taxed by the Clerk of this Court.

August 17, 1979

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:
BEEF INDUSTRY ANTITRUST LITIGATION

MDL Docket No. 248
This Matter Relates to:
CA 3-75-0702-C (Pony Creek)
CA 3-76-1237-C (Agee)
CA 3-76-1238-C (MPIA)
CA 3-76-1244-C (Lowe)
CA 3-76-1248-C (Black)
CA 3-76-1253-C (Chaparral)
CA3-76-1254-C (Petersen)

CA 3-76-1255-C (Boccardo)
CA 3-76-1361-C (Becker)
CA 3-76-1470-C (Varian)
CA 3-77-0360-C (Becker-DC)
CA 3-77-0361-C (MPIA-DC)

ORDER

The Court in its letter of October 19, 1977, informed the parties in the above causes that it would strike the retail price fixing allegations of the plaintiffs and dismiss plaintiffs' complaints on the basis of *Illinois Brick Co. v. Illinois*, —— U.S. ——, 97 S.Ct. 2061, 52 L.Ed 2d 707 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S., Oct. 3, 1977) (No. 76-404).

It is therefore ORDERED that the allegations listed in Appendix A to this Order are dismissed and stricken from such complaints.

It is further ORDERED that CA 3-76-1238-C, CA 3-76-1254-C, and CA 3-76-1361-C, upon the motions of the defendants, are dismissed with prejudice for failure to state a claim upon which relief can be granted.

It is further ORDERED that upon the Court's own motion that CA 3-75-0702-C, CA 3-76-1237-C, CA 3-76-1244-C, CA 3-76-1248-C, CA 3-76-1253-C, CA 3-76-1255-C, CA 3-76-1470-C, CA 3-77-0360-C and CA 3-77-0361-C are dismissed with prejudice for failure to state a claim upon which relief can be granted.

United States District Judge

Dec. 9, 1977

APPENDIX A

PLAINTIFFS' RETAIL PRICE-FIXING ALLOCATIONS

Petersen (CA 3-76-1254-C)

Amended Complaint, Section IV, Paragraph 2(b)-(d)

Pony Creek (CA 3-75-0702-C)

Third Amended Complaint, Paragraph 12(b)

MPIA (CA 3-76-1238-C)

Amended and Substituted Complaint, Paragraphs 34 (c)-(e) and 37(b)-(c)

Agee (CA 3-76-1237-C)

Amended Complaint, Section IV, Paragraphs 2(b)-(d)

Black (CA 3-76-1238-C)

Amended Complaint, Paragraphs 42b, 45b(2), 45b(4), 52, 72 and 74

Chaparral (CA 3-76-1253-C)

Complaint, Section V, Paragraphs 2(b) and 2(d)

Boccardo (CA 3-76-1255-C)

Amended Complaint, Paragraphs 57(b) and 57(d)

Becker (CA 3-76-1261-C)

Amended and Substituted Complaint, Paragraphs 34(c)-(e) and 37(b)-(c)

Varian (CA 3-76-1470-C)

Complaint, Section III, Paragraphs 15 and 24; and Section V, Paragraphs 2(b), 2(d) and 3

Becker-DC (CA 3-77-0360-C)

Complaint, Paragraph 25(b)

MPIA-DC (CA 3-77-0361-C)

Complaint, Paragraph 23(b)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re Beef Industry
Antitrust Litigation

MDL Docket No. 284
This Matter Relates to:
No. CA 3-75-0702-C (Pony Creek)
No. CA 3-76-1238-C (MPIA)
No. CA 3-76-1248-C (Black)
No. CA 3-76-1255-C (Boccardo)
No. CA 3-76-1361-C (Becker)
No. CA 3-77-0360-C (Becker-DC)
No. CA 3-77-0361-C (MPIA-DC)
No. CA 3-77-0362-C (Little Ranch)

ORDER

Plaintiffs in the above-referenced actions have filed or joined in various motions in response to this Court's Order of December 9, 1977, which dismissed these and other cases with prejudice on the basis of *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), *rehearing denied*, 46 U.S.L.W. 3220 (U.S. Oct. 3, 1977). Each of these motions seeks reconsideration of this Court's Order and/or seeks leave to file post-dismissal amendments to the complaints in these actions. The Court having considered each of plaintiffs' motions, as well as defendants' joint response thereto, and the Court being of the opinion that dismissal of these cases with prejudice is appropriate under *Illinois Brick Co. v. Illinois, supra*, and that justice does not require leave to file amended pleadings in the present circumstances,

IT IS THEREFORE ORDERED that each of the motions listed in Appendix A to this Order should be, and hereby are, denied.

SIGNED AND ENTERED this 24th day of Jan., 1978.

United States District Judge

APPENDIX A

1. *A. L. Black, et al. v. Albertson's, Inc., et al.*, Docket No. CA 3-76-1248-C: Motion for Leave to File Second Amended and Substituted Complaint; Also, Joinder (by letter dated December 23, 1977) and Motions for Reconsideration identified in Items 3, 4 and 5 below.

2. *James F. Boccardo, et al. v. Safeway Stores, Inc., et al.*, Docket No. CA 3-76-1255-C: Motion for Leave to Amend the First Amended Complaint.

3. *Little Ranch Co., Inc., et al. v. The National Association of Food Chains, et al.*, Docket No. CA 3-77-0362-C: Motion for Reconsideration.

4. *Pony Creek Cattle Co., Inc., et al. and Musselman Ranch Co. and Powell Cattle Co. v. The Great Atlantic & Pacific Tea Co.*, Docket No. CA 3-76-0702-C: Motion for Reconsideration/ Motion for New Trial; Motion to Alter or Amend An Order and For Relief From Order; and Motion for Leave to File Amended Complaints

5. CA 3-76-1238-C (MPIA); CA 3-76-1361-C (Becker); CA 3-77-0360-C (Becker-DC); CA 3-77-0361-C- (MPIA-DC): Motion for Reconsideration, Pursuant to F.R.C.P. 59.

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MEAT PRICE INVESTIGATORS ASSOCIATION, an Iowa unincorporated association and trust, LAVERN E. RESCHKE, DARREL KLEPPE, DEAN JACKSON, JOE MENTE, CLARENCE VOS, LYNN SHERIFF, WAYNE MEIER, DON REILLY, BILL ENO, GAY HATLE, BOB SEVERTSON, CLEM SCHROEDER, FLOYD EDGINGTON, JR., GLENN FREIE, ALLAN BERTRAM, and BYRON HAYES, Individually and as Members of the Board of Trustees of Meat Price Investigators Association; RESCHKE BROTHERS, an Illinois partnership; JACKSON FARMS, an Iowa partnership; IDLEWILD FARMS, an Iowa partnership; ENO FARMS, INC., an Iowa corporation; EDNA FEEDLOT, a Kansas partnership; and HAYES CATTLE, INC., a Missouri corporation,

Plaintiffs,

v.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC. a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY; an Illinois Corporation; STOP

& SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., a Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S, INC., a Delaware Corporation; PUEBLO INTERNATIONAL, INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 75-333-2

In Re: Beef Industry Antitrust Litigation

M.D.L. No. 248

No. CA 3-76-1238-C

(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT

Plaintiffs, as assignees and trustees of the members of Meat Price Investigators Association, by their attorneys, bring this civil action against the above-named defendants for treble the amount of damages suffered by them by reason of defendants' violation of the antitrust laws of the United States and for injunctive relief and demanding a trial by jury, complaint against the defendants and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1980 (26 Stat. 209), as

amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, for the members, now and hereafter, of Meat Price Investigators Association, an Iowa unincorporated association and trust, for three-fold the damages suffered by them, including reasonable attorneys fees, and for injunctive relief, under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of services of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on in part, within the Southern District of Iowa.

II.
PARTIES

PLAINTIFFS

3. The plaintiff, Meat Price Investigators Association (hereinafter "MPIA"), acting through its Board of Trustees, is an unincorporated association and an express trust organized and created in the Southern District of Iowa under the laws of Iowa for the purpose of, among other things, investigating and prosecuting this instant action. Meat Price Investigators Association presently has in excess of 450 members, all of whom have assigned their individual causes of action against these defendants to Meat Price Investigators Association, have given Meat Price Investigators Association a power of attorney in fact, and created an express trust in

Meat Price Investigators Association and in its Board of Trustees as trustees, to prosecute this instant action for the individual and collective benefit and on behalf of the Association and its members. The members of Meat Price Investigators Association have fed approximately 350,000 head of cattle per year during the period of which complaint is made herein. The interests of each of the members of Meat Price Investigators Association are coincident with and not antagonistic to those of other members of the Association. The claims of each of the member involve common questions of law and fact, including *inter alia* the issues raised by the defendants' acts in violation of §§ 1 and 2 of the Sherman Act as hereinafter alleged. Claims and defenses of each of the members of Meat Price Investigators Association are typical of the claims and defenses of all members of Meat Price Investigators Association. Meat Price Investigators Association has the fiduciary duties of a trustee under Iowa law pursuant to the power of attorney in fact given and the express trust created by each of the members, and as such, Meat Price Investigators Association will fairly and adequately represent and protect the interests of each of its members. The members of Meat Price Investigators Association include individual proprietorships, partnerships and corporations who have raised and fed cattle during the years 1963 to present, all of whom can be identified by their membership in the plaintiff, Meat Price Investigators Association. The members reside in the states of Iowa, Illinois, Minnesota, Missouri, Nebraska, Indiana, Colorado, South Dakota, Montana, Wyoming, Idaho, Kansas, Utah and California.

4. Members of the Board of Trustees of Meat Price Investigators Association and representative plaintiffs in this cause of action are Lavern E. Reschke, doing business in a

partnership called Reschke Brothers from Geneseo, Illinois; Darrel Kleppe, of Clinton, Iowa; Dean Jackson of Kellerton, Iowa, doing business in a partnership called Jackson Farms; Joe Mente of Wheatland, Iowa; Clarence Vos of Kingsley, Iowa, doing business in a partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Idlewild Farms; Lynn Sheriff of Sheffield, Iowa, individually and as a partner in a dissolved partnership known as Sheriff Feed and Livestock; Wayne Meier of Hubbard, Iowa; Don Reilly of LeMars, Iowa; Bill Eno of Sheffield, Iowa, a shareholder in Eno Farms, Inc.; Gay Hatle of Meadow, South Dakota; Bob Severtson of Havre, Montana; Clem Schroeder of New Providence, Iowa; Glenn Freie of Latimer, Iowa; Floyd Edgington, Jr., of Sheffield, Iowa, doing business as an individual proprietorship in Iowa and in a Kansas partnership known as Edna Feedlot; and Allan Bertram of Ireton, Iowa; and Byron Hayes, of Chillicothe, Missouri, doing business as a shareholder in Hayes Cattle, Inc., a Missouri corporation. Each of the above-named representative plaintiffs are and have been cattle raisers during all times material to this lawsuit.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D. C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and southern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in tht United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the

mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Chek, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsylvania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First

National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concen-

trated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION OF FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D. C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

III.

CO-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

IV.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of MPIA. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animal will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattleman's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of MPIA by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner Daily Market and News Service" or

"Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understand-

ings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a direct pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of

cattlemen, and particularly the plaintiffs and the members of MPIA. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various marketing areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators

at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail price of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have developed extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use

of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle

and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

V.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and co-conspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monopolize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which

artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VI.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and members of MPIA and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowldege of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of MPIA and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VII.
INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of MPIA have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and the members of MPIA and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of MPIA and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs, on behalf of members of MPIA and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of MPIA, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of MPIA be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:
BEEF INDUSTRY ANTITRUST LITIGATION

THIS MATTER PERTAINS TO:
MEAT PRICE INVESTIGATORS ASSOCIATION, ET AL.,
Plaintiffs,

vs.

SAFEWAY STORES, INC., ET AL.,
Defendants.

MDL DOCKET NO. 248
DOCKET NO. CA 3-76-1238-C

JURY DEMAND

COME NOW the plaintiffs in the above-entitled cause and hereby demand a trial by jury of the issues stated in the Complaint.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD BECKER, EUGENE VANDER HAMM, FRANCIS STECHER, DEAN STECHER, and JAMES R. GLANN, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

vs.

SAFEWAY STORES, INCORPORATED, a Maryland Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Maryland Corporation; THE KROGER CO., an Ohio Corporation; AMERICAN STORES COMPANY f/k/a ACME MARKETS, INC., a Delaware Corporation; LUCKY STORES, INC., a California Corporation; JEWEL COMPANIES, INC., a New York Corporation; WINN-DIXIE STORES, INC., a Florida Corporation; FOOD FAIR, INC., f/k/a FOOD FAIR STORES, INC., a Pennsylvania Corporation; GRAND UNION CO., a Delaware Corporation; SUPERMARKETS GENERAL CORP., a Delaware Corporation; NATIONAL TEA COMPANY, an Illinois Corporation; STOP & SHOP COMPANIES, INC., a Massachusetts Corporation; FIRST NATIONAL STORES, INC., a Massachusetts Corporation; COLONIAL STORES, INC., a Virginia Corporation; ALLIED SUPERMARKETS, INC., a Delaware Corporation; GIANT FOOD, INC., a Delaware Corporation; BORMAN'S INC., a Delaware Corporation; PUEBLO INTERNATIONAL INC., a Delaware Corporation; NATIONAL ASSOCIATION OF FOOD CHAINS, now, as a result of merger, known as FOOD MARKETING INSTITUTE; and

NATIONAL PROVISIONER, INCORPORATED, a New York Corporation,

Defendants.

CIVIL NO. 76-251-1
In re: Beef Industry Antitrust Litigation
M.D.L. No. 248
No. CA 3-76-1361-C
(N.D.Tex.)

AMENDED AND SUBSTITUTED COMPLAINT
(Class Action)
JURY TRIAL DEMAND

Plaintiffs, by and through their attorneys, bring this civil action against the above-named defendants and each of them, on behalf of themselves and all other persons, firms, corporations or other entities similarly situated for treble the amount of damages suffered by them by reason of the defendants' violation of the antitrust laws of the United States and for injunctive relief, and demanding a trial by jury, complain against defendants, and each of them, and allege as follows:

I.

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants for violations of §§ 1 and 2 of the Act of Congress of July 2, 1890 (26 Stat. 209), as amended (15 U.S.C. §§ 1 and 2) commonly known as the Sherman Act. This action is brought by the plaintiffs and each of them, and for members of the class they represent for threefold the damages suffered by them including reasonable attorneys fees, and for injunctive relief under §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26). This Court has

jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

2. Each of the defendants or its agents or co-conspirators maintains offices, transacts business, or is found within the Southern District of Iowa, and is within the jurisdiction of this Court for the purpose of service of process. Many of the unlawful acts done in violation of the antitrust laws, as hereinafter alleged, have been performed within the Southern District of Iowa. The interstate trade and commerce described hereinafter is carried on, in part, within the Southern District of Iowa.

II.
CLASS ACTION

3. This Complaint is properly maintainable as a class action under the provisions of Federal Rules of Civil Procedure 23(a) and 23(b)(3) as follows:

a. The class consists of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle and each person who has in the period in question sold more than 100 head of fat cattle per annum, with the exception that the plaintiffs' named in the following enumerated lawsuits presently on file in the various district courts of the United States are not a part of this class:

(1) *Peterson, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-0984-RFP (N.D.Cal., filed May 16, 1975);

(2) *Pony Creek Cattle Company, Inc., et al. v. The Great Atlantic & Pacific Tea Company, et al.*, Civil No. CA 3-75-0702-C (N.D.Tex. [Dallas Division] filed June 3, 1975);

(3) *Lowe, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-4043 (N.D.Iowa, filed July 29, 1975);

(4) *Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.*, Civil No. C-75-333-2 (S.D.Iowa, filed December 1, 1975);

(5) *Agee, et al. v. Safeway Stores, Inc., et al.*, Civil No. R-75-224-BRT (D.Nev., filed December 5, 1975);

(6) *Black, et al. v. Acme Markets, Inc., et al.*, Civil No. CA 2-75-186 (N.D. Tex. [Amarillo Division] filed December 30, 1975);

(7) *Chaparral Cattle Corp., et al. v. Safeway Stores, Inc., et al.*, Civil No. C-76-79 (D.Utah [Central Division], filed March 15, 1976);

(8) *James F. Boccardo and Boccardo Cattle Company v. Safeway Stores, Inc., et al.*, Civil No. C-76-600-OJC (N.D.Cal., filed March 24, 1976).

b. Plaintiffs are members of said class; their claims are typical of the claims of the members of said class.

c. Plaintiffs believe that the members of said class are so numerous as to make joinder impracticable, the exact number and identification of the class being unknown to plaintiffs, but on information plaintiffs believe that the class would consist of approximately 36,000 fat cattle producers or feeders.

d. The claims of the class involve common questions of both fact and law. Some common questions of fact include whether the defendants participated in a combination and conspiracy to fix, artificially maintain, stabilize or lower the selling price of choice beef or its equivalent purchased by them during the period in question, thus directly lowering the selling price for fat cattle; whether the defendants utilized market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef; whether the defendants agreed to allocate geographic territories among themselves and to increase their market concentration and dominance in given areas; whether the defendants have agreed to specify different quality, yield and trim standards for wholesale slaughtered beef;

whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating competition for fresh, frozen and processed beef by employing a system of agreed-upon price leadership, which prices are followed by other defendants and co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast; whether the defendants have combined and conspired and attempted to monopolize for the purpose of eliminating price competition for slaughtered beef by means of manipulation of the "Yellow Sheet;" and whether the defendants have monopolized, attempted to monopolize and combined to monopolize important areas of beef purchasing, and cattle purchasing, which has directly affected and controlled the price of live cattle. Some common questions of law include whether the actions alleged constitute violations of §§ 1 and 2 of the Sherman Act and thereby create liability of the defendants to the class.

e. The questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

f. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

g. Plaintiffs will adequately represent the interests of the class.

III.
PARTIES

PLAINTIFFS

4. Plaintiffs, Ronald Becker, Ireton, Iowa; Eugene Vander Hamm, Ireton, Iowa; Francis Stecher, Stockton, Iowa; Dean Stecher, Stockton, Iowa; and James R. Glann, Oklahoma City, Oklahoma, are and have been at all times material hereto raisers and feeders of fat cattle for ultimate slaughter.

DEFENDANTS

5. The defendant SAFEWAY STORES, INCORPORATED (hereinafter "Safeway") is a Maryland corporation with its principal office in Oakland, California. Safeway and its subsidiaries operate the largest chain of retail food stores in the United States, with more than 2400 stores, concentrated primarily west of the Mississippi River and also in the Washington, D.C. area. Safeway buys beef at wholesale and sells beef at retail.

6. The defendant THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. (hereinafter "A&P") is a Maryland corporation with its principal office in Montvale, New Jersey. A&P and its subsidiaries operate the second largest chain of retail food stores in the United States, with more than 2,000 stores, concentrated east of the Mississippi River. A&P buys beef at wholesale and sells beef at retail.

7. The defendant THE KROGER CO. (hereinafter "Kroger") is an Ohio corporation with its principal office in Cincinnati, Ohio. Kroger and its subsidiaries operate the third largest chain of retail food stores in the United States, with more than 1,200 stores, concentrated in the mid-Atlantic, mid-Western and southern regions of the United States. Kroger buys beef at wholesale and sells beef at retail.

8. The defendant AMERICAN STORES COMPANY, formerly Acme Markets, Inc. (hereinafter "American Stores") is a Delaware corporation with principal offices in Wilmington, Delaware. American Stores and its subsidiaries operate 787 retail food stores in the United States, with Acme Markets stores concentrated in the mid-Atlantic states and Alpha Beta stores concentrated in Arizona and California. These stores buy beef at wholesale and sell beef at retail. American Stores runs beef slaughtering and packing facilities which

purchase cattle and supply virtually all requirements of American Stores' retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

9. The defendant LUCKY STORES, INC. (hereinafter "Lucky") is a California corporation with its principal offices in Dublin, California. Lucky and its subsidiaries operate approximately 400 retail food stores in the United States, with Lucky and Food Basket stores concentrated in California and the Western states and Eagle stores concentrated in the mid-West and Texas. Lucky purchases beef at wholesale and sells beef at retail.

10. The defendant JEWEL COMPANIES, INC. (hereinafter "Jewel") is a New York corporation with principal offices in Chicago, Illinois. Jewel and its subsidiaries operate approximately 400 retail food stores in the United States, with approximately 300 Jewel and Eisner stores concentrated in the Chicago area, approximately 60 Star stores concentrated in New England and 40 Buttrey stores concentrated in the Northwest. Jewel purchases beef at wholesale and sells beef at retail.

11. The defendant WINN-DIXIE STORES, INC. (hereinafter "Winn-Dixie") is a Florida corporation with its principal offices in Jacksonville, Florida. Winn-Dixie and its subsidiaries operate approximately 1,000 retail food stores under the names Winn-Dixie and Kwik-Check, which are concentrated in the Southeastern United States. Winn-Dixie purchases beef at wholesale and sells beef at retail. Winn-Dixie also runs beef slaughtering and packing plants which purchase live cattle and supply and sell beef at wholesale.

12. The defendant FOOD FAIR, INC., formerly Food Fair Stores, Inc. (hereinafter "Food Fair"), is a Pennsylvania corporation with principal offices in Philadelphia, Pennsyl-

vania. Food Fair and its subsidiaries operate approximately 450 retail food stores concentrated in the eastern seaboard area of the United States and particularly concentrated in Florida and Pennsylvania. Food Fair buys beef at wholesale and sells beef at retail. Food Fair also operates beef slaughtering and packing plants which purchase cattle and supply virtually all of requirements of Food Fair's retail outlets as well as sell beef at wholesale to other defendant chain stores and co-conspirators.

13. The defendant GRAND UNION CO. (hereinafter "Grand Union") is a Delaware corporation with principal offices in Elmwood Park, New Jersey. Grand Union and its subsidiaries operate approximately 500 retail food stores concentrated along the eastern seaboard area of the United States and concentrated particularly in New York and New Jersey. Grand Union purchases beef at wholesale and sells beef at retail.

14. The defendant SUPERMARKETS GENERAL CORP. (hereinafter "Supermarkets General") is a Delaware corporation with principal offices in Woodbridge, New Jersey. Supermarkets General operates over 100 supermarket-drugstore retail outlets under the name "Pathmark," which are concentrated in the mid-Atlantic region of the United States. Supermarkets General purchases beef at wholesale and sells beef at retail.

15. The defendant NATIONAL TEA COMPANY (hereinafter "National Tea") is an Illinois corporation with principal offices in Rosemont, Illinois. National Tea and its subsidiaries operate more than 450 retail food stores in the United States, concentrated primarily in the midwest and south central United States. National Tea buys beef at wholesale and sells beef at retail.

16. The defendant STOP & SHOP COMPANIES, INC. (hereinafter "Stop & Shop") is a Massachusetts corporation with principal offices in Boston, Massachusetts. Stop & Shop and its subsidiaries operate over 300 retail food stores concentrated in the New England area of the United States. Stop & Shop buys beef at wholesale and sells beef at retail.

17. The defendant FIRST NATIONAL STORES, INC. (hereinafter "First National") is a Massachusetts corporation with principal offices in Somerville, Massachusetts. First National and its subsidiaries operate over 260 retail food stores, concentrated primarily in the New England area of the United States and in New York and New Jersey under the name Finast. First National buys beef at wholesale and sells beef at retail.

18. The defendant COLONIAL STORES, INC. (hereinafter "Colonial") is a Virginia corporation with principal offices in Atlanta, Georgia. Colonial and its subsidiaries operate over 375 retail food stores concentrated in the southeastern part of the United States. Colonial buys beef at wholesale and sells beef at retail.

19. The defendant ALLIED SUPERMARKETS, INC. (hereinafter "Allied") is a Delaware corporation with principal offices in Livonia, Michigan. Allied and its subsidiaries operate approximately 250 retail food stores concentrated in the midwestern United States and particularly in Michigan and Ohio. Allied buys beef at wholesale and sells beef at retail.

20. The defendant GIANT FOOD, INC. (hereinafter "Giant") is a Delaware corporation with principal offices in Landover, Maryland. Giant and its subsidiaries operate over 100 retail food stores concentrated in the Washington, D.C. area. Giant buys beef at wholesale and sells beef at retail.

21. The defendant BORMAN'S, INC. (hereinafter "Borman's") is a Delaware corporation with principal offices in Detroit, Michigan. Borman's and its subsidiaries operate over 80 retail food stores concentrated in the Detroit, Michigan, area. Borman's buys beef at wholesale and sells beef at retail.

22. The defendant PUEBLO INTERNATIONAL, INC. (hereinafter "Pueblo") is a Delaware corporation with principal offices in New York, New York. Pueblo and its subsidiaries operate approximately 100 retail food stores concentrated under the name Pueblo in Puerto Rico and under the name Hills in New York City. Pueblo buys beef at wholesale and sells beef at retail.

23. The defendant NATIONAL ASSOCIATION of FOOD CHAINS, now as a result of merger known as FOOD MARKETING INSTITUTE (hereinafter "NAFC"), has principal offices located in Washington, D.C., and Chicago, Illinois. NAFC is a trade organization whose members are the largest retail food chains in the United States; small food companies and independents were formerly not eligible for membership. The retail food chains that comprise the membership of the NAFC are the largest purchasers of carcass beef in the United States. The NAFC recently has merged with the Supermarket Institute and is now known as Food Marketing Institute.

24. The defendant NATIONAL PROVISIONER, INCORPORATED (hereinafter "National Provisioner") is a New York corporation with principal offices in Chicago, Illinois. The National Provisioner publishes market advisory services, including The National Provisioner Daily Market and News Service or "Yellow Sheet" which lists the prices for beef during various time periods.

IV.

Co-CONSPIRATORS

25. Various other companies, firms, associations, and individuals not now made defendants in this Complaint, participated as co-conspirators in the offenses charged herein, and in other concurrent conspiracies in violation of the antitrust laws, which jointly and/or severally and/or concurrently have injured the plaintiffs in their businesses and properties, and performed acts and made statements in furtherance thereof.

V.

NATURE OF TRADE AND COMMERCE

26. Cattle are raised and fed on farms, ranches and feedlots such as those operated by the plaintiffs and members of the class herein. Some cattlemen purchase calves from others for fattening, while other cattlemen fatten cattle they have raised from birth. Cattle are fattened by feeding them a concentrated feed ration for fast growth and fattening until they are ready for slaughter as fat cattle.

27. Cattlemen must make irrevocable decisions concerning the supply of cattle between six and 18 months prior to the time that the animals will be marketed. These decisions are known to packers and defendant chain stores and other co-conspirators through reports made by the United States Department of Agriculture and others. Inasmuch as the cattleman's decision to raise and feed cattle must be made from six to 18 months in advance of sale, he cannot pass on or recoup from his suppliers any damages or loss resulting from his sale of cattle. A fat steer or heifer is required to be sold within a three-week period of time when the animal reaches choice grade. The cattleman must accept whatever price is given at that time, because retention of the animal results in over-fattening and significant loss of value. Supply of cattle and beef

in the short term is known throughout the industry and is inelastic.

28. The vast majority of fat cattle are purchased by beef slaughterers and packers directly from cattlemen, although some fat cattle are purchased by beef slaughterers through terminal or auction markets. The direct basis for the price given plaintiffs and members of the class by beef slaughterers for fat cattle is a price stated in a publication known as the "National Provisioner daily Market and News Service" or "Yellow Sheet" for all transactions east of the Rocky Mountains and some transactions west of the Rocky Mountains, and for other transactions west of the Rocky Mountains, the "Safeway price." Cattle buyers for beef slaughterers figure the percentage of dressed meat on the live animal and give the cattle feeder a price for the live animal based upon the value of the dressed carcass according to a formula based on the Yellow Sheet or its west coast counterpart, the "Safeway price."

29. Beef slaughterers and packers slaughter live cattle and sell edible beef and beef by-products in interstate commerce. The live cattle are reduced by the slaughterers and packers to carcass beef, beef primals and beef sub-primals prior to sale. Some edible beef is sold by slaughterers and packers as hanging beef, while other beef is vacuum-packed and sold by packers as boxed beef.

30. A substantial majority of edible beef is sold to retail food chain stores such as the defendants herein. Large food chains buy most beef directly from packers and slaughterers. The wholesale market for choice beef in the United States is established on a weekly basis by the actions of the defendants and other co-conspirators, through their size and monopsony market power and as a result of understandings and agreements among themselves and other retail food chains.

31. A&P and Safeway, and other co-conspirators at other times and places, negotiate for and buy beef in the wholesale market early in the week, which establishes the wholesale price of beef for the remainder of the defendants and co-conspirator chain stores. The price is established by the major leading chains through the use of their monopsony market power, which is enlarged and enhanced by their understandings and agreements with other defendants and co-conspirators. This action is designed to depress the wholesale price of carcass and boxed beef, which directly controls the price of live cattle.

32. The weekly pricing decisions of A&P, Safeway and other defendants and co-conspirators are instantly communicated by the wholesale beef trade (including chain store buyers, brokers, breakers, packers, and others). The cattleman is not privy to any of this extensive communication among the wholesale beef trade. The weekly market pricing decisions of A&P and Safeway and other defendants and co-conspirators are then reflected in the Yellow Sheet and the west coast "Safeway price." Other co-defendant chain stores and co-conspirators utilize this Yellow Sheet price or "Safeway price" as the contractual basis for the price they will pay beef packers and slaughterers for wholesale beef.

33. Approximately 80 per cent of the choice slaughtered beef in the United States is purchased by formulae, the basis of which is the Yellow Sheet price and the west coast "Safeway price." This use by chain store defendants and co-conspirators of the Yellow Sheet and the "Safeway price" as a tool to communicate price and as a basis for wholesale beef prices, combined with the use of the Yellow Sheet and the "Safeway price" by all major beef slaughterers and packers as a direct basis of prices paid for live cattle, constitutes a di-

rect pass-through of the price established by the defendant chain stores to the cattlemen.

34. At dates unknown to the plaintiffs, including some believed to be prior to 1963, the defendants and other co-conspirator chain stores combined and conspired to employ monopolistic-monopsonistic and other non-competitive methods in the purchase and marketing of beef to the detriment of cattlemen, and particularly the plaintiffs and the class represented herein. Among the overt manifestations of these combinations, agreements and attempts to monopolize, are the following:

a. Many retail food chains, including the defendant food chains named herein and other co-conspirators, have engaged in centralized buying whereby beef purchases can be made for the entire chain or a substantial part thereof, from one or more central locations.

b. Specifications have been established by the defendant retail food chains and other co-conspirators for the beef they buy. In most instances, the specifications for beef carcasses or parts thereof have varied among the different defendant food chains and other co-conspirators in instances where the defendant food chains have had retail marketing outlets in the same marketing area, or in instances where the various different defendant food chains have been buying from the same packer or slaughterer sources, thus eliminating competition between and among the defendants and other co-conspirators.

c. The defendant food chains and other co-conspirators have allocated retail marketing areas of the United States so that retail outlets of the defendants compete with one another in increasingly fewer instances. Over the years, defendants and other co-conspirators have increasingly engaged in the practice of concentrating more intensively in the various mar-

keting areas in which they have been dominant for the purpose of eliminating competition, attempting to monopolize and establishing market dominance.

d. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in purchasing beef at wholesale. Instead they have agreed that A&P and Safeway, and other defendants and co-conspirators at other times and places, will establish the wholesale price and the remaining defendants and co-conspirators will utilize the Yellow Sheet or "Safeway price." This is for the designed purpose of eliminating price competition for wholesale beef, of increasing the wholesale-retail price spreads for beef and of driving down the price of live cattle.

e. The defendant food chains and other co-conspirators have agreed not to compete with one another on a price basis in the pricing of beef at retail. Instead, they have agreed to establish uniform margins or spreads between the wholesale and retail prices of the various beef cuts. Further, the defendant food chains and other co-conspirators have agreed upon uniform advertising policies and the uniform raising and lowering of retail beef prices for the designed purpose of manipulating and influencing the consumer demand for beef. Through uniform entry into the wholesale beef market or uniform withdrawal from the wholesale beef market, the defendant food chains and other co-conspirators have combined to monopolize to affect the demand for beef products and artificially depress the wholesale price of beef products to an unreasonably low level, which level is directly reflected by the Yellow Sheet price and the "Safeway price," and which prices are directly passed on to the beef producer.

f. By combining to utilize their superior marketing power, the defendant food chains and other co-conspirators have de-

veloped extensive warehousing facilities and have utilized vacuum-packaging as a device to store beef for an extended period of time, permitting said chains and other co-conspirators to uniformly withdraw from the wholesale beef market for the purpose of artificially lessening the demand for newly slaughtered beef and cattle, thus directly and artificially lowering the price for cattle. Through combination and the use of monopoly power and knowledge, this warehousing and use of vacuum-packaging has been used by the defendant chain stores and other co-conspirators as a lever to depress the price of beef, to break price rallies, and to depress the beef prices to an artificially low level.

34. Most slaughterers and packers have standing agreements with various receivers, including the defendant chain stores and other co-conspirators, for certain quantities of beef each week. With knowledge of their weekly requirements and of the prices quoted in the Yellow Sheet or the "Safeway price," the packers and slaughterers directly pass down the price established by the defendant retail food chains. The packers and slaughterers in aggregate do not suffer any diminution of sales, purchases, margins or profits as a result of this artificially low price.

35. During the period of time covered by this Complaint, defendants have been and are now engaged in interstate trade and commerce in the purchase, distribution and sale of fresh, frozen and processed beef products. Cattle move by truck and railroad in interstate commerce from calf-producing states into Iowa, including the Southern District of Iowa, and other states. Most livestock slaughtering plants are located near the areas of livestock production and feeding, a major area of which is Iowa, including the Southern District of Iowa. Beef carcasses and parts thereof from the slaughterhouses and meat

packers move by truck and railroad in interstate commerce from and through Iowa, including the Southern District of Iowa, and other states to surrounding states and into all areas of the United States. The defendant retail food chains and others distribute the processed beef in interstate commerce to their various store locations throughout the United States. There is a continuous movement of cattle and fresh, frozen and processed beef across state lines in the channels of interstate commerce. Violations of the antitrust laws hereinafter alleged have necessarily directly and substantially affected the aforesaid interstate trade and commerce in cattle and fresh, frozen, and processed beef.

VI.

OFFENSES CHARGED

36. Beginning at a date unknown to the plaintiffs, but at least as early as 1963, and continuing up to the date of this Amended and Substituted Complaint, the defendants and coconspirators, through meetings arranged and conducted by defendant, National Association of Food Chains (now as a result of merger known as Food Marketing Institute), and by other means, have engaged and are now engaged in an unlawful combination and conspiracy and unreasonable restraint of the aforesaid trade and commerce in cattle and fresh and processed beef and have engaged and are now engaged in an unlawful combination and conspiracy to monopolize and have monopolized and attempted to monopolize, and are now monopolizing and attempting to monopolize, both unilaterally and jointly, such trade and commerce in violation of §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

37. The aforesaid combination and conspiracy to restrain trade and commerce and the combination and conspiracy to monopolize and the monopolization and the attempt to monop-

olize such trade and commerce have consisted of a continuing course of conduct, plan, agreement and concert of action by and among the defendants and their co-conspirators, the substantial terms, purposes and intent of which have been to:

a. Fix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, which artificially low prices are directly passed through to cattlemen and are not absorbed in whole or in part by packers and slaughterers, because of the utilization of the device of formula pricing to cattlemen based upon the Yellow Sheet, and on the west coast, the "Safeway price."

b. Utilize market dominance and economic power to constantly increase in a non-cost justified manner, the wholesale-retail price margin or spread for beef, by charging non-competitive and artificially high prices for fresh and processed beef sold at retail to consumers, thus artificially depressing the true demand for beef and manipulating, controlling and depressing the price of cattle.

c. Allocate geographic territories among themselves to eliminate competition among themselves and other co-conspirators in the purchase and sale of beef and to increase market concentration and dominance in given areas, to increase the wholesale-retail price spread of beef, and thus to cause the price of wholesale slaughtered beef and cattle to drop to artificially low levels.

d. Specify different quality, yield and trim standards for wholesale slaughtered beef in instances where the defendants have retail stores in the same geographic area, or where the defendants buy wholesale beef from the same packer and slaughterer sources, for the purpose of eliminating competition among themselves and artificially depressing demand and price for cattle.

e. Eliminate competition for fresh and processed beef by employing a system whereby A&P and Safeway, and other co-conspirators at other times and places, set prices on an agreed-upon and understood time of the week, which prices are followed by all other defendant retail food chains and other co-conspirators by means of formula prices based on the "Yellow Sheet" and the "Safeway price" on the west coast.

f. Eliminate price competition for fresh and processed beef by means of manipulation of the "Yellow Sheet" published by the defendant, National Provisioner, for the purpose of communicating beef prices and calculating beef prices, with knowledge that the "Yellow Sheet" price is utilized by all major beef packers and slaughterers as a device to directly pass on to cattlemen the artificially low price set by the defendant food chains and other co-conspirators.

g. Utilize the National Association of Food Chains and others to develop and effectuate the aforesaid price-fixing conspiracy and attempt to monopolize.

VII.

FRAUDULENT CONCEALMENT

38. The defendants and co-conspirators repeatedly fraudulently concealed the existence of their combination and conspiracy and attempt to monopolize by various means used to avoid the detection thereof, including express denials on the public record under oath, of meeting together to discuss meat pricing, and as a result of such concealment the plaintiffs and each of them had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existence of the combination and conspiracy and attempt to monopolize until July 17, 1974, when it was disclosed in a trial at the United States District Court for the Northern District of California that the defendant co-conspirators did indeed meet together to discuss the pricing of beef.

39. By virtue of this fraudulent concealment, plaintiffs and members of the class plaintiffs and each of them, assert the tolling of the applicable statute or period of limitations affecting plaintiffs' rights to action herein.

VIII.

INJURY TO PLAINTIFFS

40. As a direct and proximate result of the unlawful acts and conduct of defendants and co-conspirators hereinbefore alleged, plaintiffs and members of the class of plaintiffs have suffered injury to their business and property as follows:

a. Loss of and reduction in value of their respective businesses;

b. Loss and decrease in revenues and profits which would have otherwise been earned;

c. Incurrence of additional expenses which would otherwise have been avoided by the increased economies lost due to the inhibition and limitation on expansion caused by depressed prices.

d. Loss of revenues measured by the difference between the artificially depressed price received by plaintiffs and members of the class and the price they would have received had free market conditions existed.

41. The precise extent of the aforesaid damages are not presently known, and plaintiffs hereby pray leave of Court to amend this Complaint when said amount has been ascertained.

WHEREFORE, Plaintiffs and members of the class of plaintiffs pray that this Court adjudge and decree that:

1. Defendants and their co-conspirators have combined and conspired in restraint of trade and commerce as hereinabove described, and have combined and conspired to monopolize, have monopolized and attempted to monopolize the aforesaid trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2);

2. Plaintiffs and members of the class of plaintiffs, and each of them, have been injured as a direct and proximate result of the aforesaid violations of the antitrust laws of the United States;

3. Plaintiffs and the members of the class of plaintiffs, and each of them, recover their actual damages which must be trebled in accordance with the provisions of Section 4 of the Clayton Act (15 U.S.C. § 15) from the defendants who are jointly and severally liable therefor;

4. Plaintiffs and the members of the class, and each of them, recover the costs of suit together with attorneys' fees as provided by § 4 of the Clayton Act (15 U.S.C. § 15);

5. Defendants, and each of them, be permanently enjoined and restrained from each and every unlawful practice alleged herein as provided by Section 16 of the Clayton Act (15 U.S.C. § 26);

6. Plaintiffs and the members of the class be awarded such other and further relief as this Court may deem just and proper.

Dated this 16th day of August, 1977.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:
BEEF INDUSTRY ANTITRUST LITIGATION

THIS MATTER PERTAINS TO:
RONALD BECKER, et al

Plaintiffs

vs.

SAFEWAY STORES, INC., et al

Defendants

MDL DOCKET NO. 248
DOCKET NO. CA 3-76-1361-C

JURY DEMAND

COME NOW the plaintiffs in the above-entitled cause and hereby demand a trial by jury of the issues stated in the Complaint.

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APPENDIX B

SHERMAN ACT

§1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. §1.)

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. §2.)

CLAYTON ACT

§4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. §15.)

§16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (15 U.S.C. §26.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 8.

(a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(e)(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(f) All pleadings shall be so construed as to do substantial justice.

Rule 12.

(b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party

is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 15.

(a) A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

. (c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

FILED
AUG 22 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1959, 79-2060, 80-103, and 80-105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MEAT PRICE INVESTIGATORS ASSOCIATION, *et al.*,
Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Respondents.

A. L. BLACK, *et al.*,
Petitioners,
v.
ALBERTSON'S, INC., *et al.*,
Respondents.

RICHARD S. LOWE, *et al.*,
Cross-Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Cross-Respondents.

R. DIRK AGEE, *et al.*,
Petitioners,
v.
SAFEWAY STORES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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August 22, 1980

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the above captioned petitions for writs of certiorari to review the decision of the United States Court of Appeals in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979).

STATEMENT OF THE CASE

Several hundred cattlemen (including the petitioners herein) have sued 25 food retailers, a wholesale grocer, a retailers' trade association, and a beef industry publication (respondents herein). The cattlemen allege that the named defendants and others unnamed had conspired to pay meat packers low prices for beef and that the packers had passed on the impact to the cattlemen by paying low prices for live cattle.[1] The cattlemen do not claim that they sold any of their cattle directly to the retailers.

On June 9, 1977, this Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), which holds that only those persons who deal directly with alleged price fixing conspirators may maintain private actions for treble damages.[2] In July 1977 respondents moved for judgment

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[1] In 1976, the Judicial Panel on Multidistrict Litigation assigned the cattlemen's cases to the District Court for the Northern District of Texas. *In re Beef Industry Antitrust Litigation*, 419 F. Supp. 720 (J.P.M.D.L. 1976). Certain of the same cattlemen plaintiffs shortly thereafter filed new suits, including an industry-wide class action, against a number of the largest meat packers, alleging that the cause of depressed cattle prices was a conspiracy among the middleman meat packers. These cases were also transferred to the Northern District of Texas. *See In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 170 (5th Cir. 1979), *petition for cert. filed sub nom. Iowa Beef Processors, Inc.* v. *Meat Price Investigators Ass'n*, 48 U.S.L.W. 3538 (U.S. Feb. 6, 1980) (No. 79-1214).

[2] The holding made treatment of claims and defenses consistent by completing the analysis in this Court's prior decision in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There the Court held that, in a suit by direct purchasers, an anti-

on the pleadings. The cattlemen were thereafter allowed to amend their complaints to take account of *Illinois Brick* and respondents' motion. Some of the petitioners filed amendments in an attempt to avoid *Illinois Brick*; others elected to stand on the complaints originally filed. In October 1977 the district court announced its intention to dismiss the complaints. Some plaintiffs then advised the court that they might seek further leave to amend, but none did so by December 9, 1977, when the court finally dismissed the complaints with prejudice.

The court of appeals reversed. It held that, although *Illinois Brick* is applicable, the indirect suits could nonetheless be maintained upon allegations that supply was inelastic and that middlemen used formulas in computing price, with the result that the cattlemen bore the full impact of any conspiracy. Respondents have sought certiorari to review this determination by the court of appeals. *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920.

Respondents' petition asserts that *Illinois Brick* prohibited antitrust actions by indirect purchasers or sellers in order to eliminate from litigation the need to engage in the complex process of apportioning effects of price or output decisions throughout a distribution chain; that the court below would create a new exception for remote claimants that would invite widespread litigation of just those effects; and that in this respect the decision is contrary to *Illinois Brick*, is squarely in conflict with decisions in other circuits, and will have serious adverse consequences for the conduct of antitrust cases because of the substantial abandonment of the *Illinois Brick* rule.

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trust defendant may not assert as a defense that the plaintiffs had passed on illegal overcharges to indirect purchasers who were therefore the parties in fact injured by the overcharge. *Id.* at 491-94. The cases and possible exceptions are discussed in respondents' petition for certiorari. *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920, at 5.

The cattlemen have filed the instant cross petitions for certiorari (Nos. 79-1959, 79-2060, 80-103, and 80-105). The cattlemen's petitions present three different issues:

(1) Does the rule of *Illinois Brick* apply only when a customer tries to sue a remote supplier, and not when a supplier tries to sue a remote customer.

(2) Does the rule of *Illinois Brick* permit indirect suits upon allegations that direct purchasers or sellers do not have strong incentives to sue.

(3) Did the lower courts misconstrue the cattlemen's complaints or improperly refuse additional amendments.

ARGUMENT

The additional issues raised by the cattlemen-petitioners are insubstantial and do not warrant review by this Court. The cross petitions argue principally that *Illinois Brick* and *Hanover Shoe* were wrongly decided. But petitioners offer no special reason why this Court should visit those decisions anew.

I

In *Illinois Brick* and *Hanover Shoe* this Court addressed questions of major public import for the enforcement of the antitrust laws through private damage actions. Efforts to apportion recovery for injury absorbed at various tiers in a chain of distribution had produced difficulties for courts and litigants, had burdened the judicial system, and had impaired the efficacy of private antitrust enforcement itself. This Court determined that private actions should not be burdened with these apportionment questions. The rule of *Illinois Brick* was designed specifically to accomplish that result.

The cattlemen-petitioners nonetheless contend that, while the rule may be appropriate in cases where customers sue, it should not apply to bar claims by suppliers.

But uncertainties and difficulties in analyzing price and output decisions are equally present whether an indirect plaintiff is a customer or a supplier. In either case the apportionment rests on the same theory and calls for the same type of evidence; and in either case it is necessary to prove how prices, sales, costs, and benefits would have varied at each level in the distribution chain if the challenged conduct had not occurred.[3] The court of appeals therefore held that

> "there is nothing special about monopsony or oligopsony price-fixing cases that justifies treating them differently from monopoly price-fixing cases for passing-on purposes. *Illinois Brick* therefore speaks to the instant cases." *Beef Industry*, 600 F.2d at 1159.

The court of appeals was clearly correct. This issue was resolved in *Illinois Brick*. There has since been no conflict in the circuits[4] and the cattlemen's petitions raise nothing new.

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[3] *See Illinois Brick*, 431 U.S. at 731-33. In *Illinois Brick* the defendant was alleged to benefit from high prices charged to direct purchasers; here the defendants are alleged to benefit from low prices paid to direct suppliers. As the court below found, both types of circumstances are "attended by restrictions in industry output and the consequent reallocation of resources to less valuable uses." *Beef Industry*, 600 F.2d at 1158.

[4] Petitioners in No. 79-2060 are simply wrong in suggesting that the Fifth Circuit's decision on this point creates a conflict in the circuits. None of their cited cases involved, as here, the application of *Illinois Brick* to suits by indirect sellers. Thus, *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979), and *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979), involved suits brought by indirect purchasers; *In re Japanese Electronic Products Antitrust Litigation*, 1980-2 Trade Reg. Rep. (CCH) ¶ 63,418 (E.D. Pa. 1980), and *In re Uranium Antitrust Litigation*, 473 F. Supp. 393 (N.D. Ill. 1979), involved suits brought by a direct competitor; and *Fontana Avia-*

Petitioners also argue that their supplier claims are not pass-on claims because they must sell into a market whose total price level is depressed and, as a result, some cattlemen whose beef does not reach any of the respondent retailers may nevertheless be injured by the general reduction in prices caused by the alleged violations.[5] The purported difference is irrelevant. Petitioners' complaints plainly allege, as they must, a pass-on theory requiring apportionment of effects.[6] And proof of injury must still

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tion, Inc. v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), involved a suit brought by a firm that was both a direct competitor of and purchaser from defendant. The only one of those decisions that directly addressed the issue even in dictum concluded that, for purposes of the *Illinois Brick* rule, suits by indirect sellers are "the simple mirror image" of suits by indirect purchasers. *In re Japanese Electronic Products Antitrust Litigation*, 1980-2 Trade Reg. Rep. (CCH) ¶ 63,418 at 76,155.

[5] In support of the contention that theirs are not pass-on claims, petitioners cite a footnote from the court of appeals' decision in which the court indicated that plaintiffs' theory of damages is not a pass-on theory "in all respects." *Beef Industry*, 600 F.2d at 1166 n.24. The cited footnote discusses the different problem of following a specific product through a distribution chain. The court's opinion recognizes throughout that petitioners were relying on a pass-on theory.

[6] For example, petitioner MPIA—whose complaint was amended to meet *Illinois Brick* and was then adopted by other plaintiffs as "typical of the allegations of all complaints at issue here" (Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings, MDL Record at 1382 n.2, *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979))—alleged that the respondent food retailers "[f]ix, stabilize and maintain at uniform non-competitive and artificially low levels, the price paid to slaughterhouses and beef packers for fresh and processed beef, *which artificially low prices are directly passed through to cattlemen. . . .*" Amended Complaint, MPIA Record at 861 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979). Similarly, plaintiffs in *Black* explicitly alleged that "[t]he prices paid by retailers . . . for dressed meat at wholesale *ultimately filter down in the form of lower prices*, which are

be made for each claimant by apportioning the effects of price changes through multiple distribution levels.[7]

II

The cattlemen-petitioners also urge that the rule of *Illinois Brick* and *Hanover Shoe* should be changed to permit indirect plaintiffs to bring suit whenever there may not be strong incentives for the direct plaintiff to sue. This question has also specifically been resolved by this Court.

In *Hanover Shoe* this Court held that the payment of an unlawful price establishes a prima facie case of injury and damage within the meaning of Section 4 of the Clayton Act and that it is irrelevant that the impact may thereafter have been passed on to others.[8] In *Illinois Brick* the Court completed the equation by refusing to permit allocation of damages "among all 'those within the defendant's chain of distribution'" and holding that only those who deal directly with alleged price fixers may sue.[9] The Court expressly rejected the argument that the result should be different because the middleman in some circumstances may not have incentive to sue. It

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passed on through the distribution chain until they reach the livestock producers and the feeders of livestock. . . ." Amended Complaint, Black Record at 46 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979).

[7] The complexities of proof caused by such apportionment are particularly apparent in a case like that of the *Lowe* petitioners who, as cattle feeders, are themselves middlemen who buy cattle and later resell them to meat packers for eventual resale to retailers. *See* Petition No. 80-103 at 3.

[8] 392 U.S. at 488-94.

[9] 431 U.S. at 746.

acknowledged the possibility that some persons "who may have been actually injured" may not recover and some suits might not be brought at all.[10] The Court chose nonetheless to give full sanction to the direct suits and to bar the indirect claims in their entirety in order to make antitrust enforcement more effective by eliminating complexities of proof.

The Court said:

> "[O]n balance, and until there are clear directions from Congress to the contrary, we conclude that the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4, *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S., at 262, is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Illinois Brick*, 431 U.S. at 746.

Congress has not given any indication to the contrary. Nothing else has transpired since the decision of this Court to suggest that the Court was wrong. The cross petitions simply seek to have this Court revisit—without cause—the basic issue that it carefully and appropriately resolved just three years ago.

III

The court of appeals examined and properly rejected the cattlemen-petitioners' assertions (1) that the amended complaints alleged a conspiracy between respondents and the middleman packers, and (2) that if they did not, the district court should have granted petitioners leave to make further amendments toward that end. The court of appeals found that the interpretations sought by the cattlemen were inconsistent with the al-

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[10] *Id.*

legations of the complaints.[11] It also found that there had been ample opportunity to amend and that the district court had not abused its discretion in prohibiting additional amendments after judgment.[12]

Petitioners do not challenge the standards applied to determine when pleadings are adequate and when amendments should be permitted.[13] The only questions petitioners raise relate to specific interpretations of complaint

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[11] *Beef Industry*, 600 F.2d at 1161. For example, the *Lowe* petitioners—who now imply that their complaint alleged a vertical conspiracy between retailers and unnamed meat packers (Petition No. 80-103 at 4, 14-17)—actually alleged that "Defendants . . . and *other unnamed co-conspirator grocery chains*, have, by the unlawful exercise of their market power, precluded meat packers . . . from effectively bargaining over prices . . . at which fresh, frozen and processed meat is sold . . . to grocery chains. . . ." Complaint, Lowe Record at 13-14 (emphasis added), *Beef Industry*, 600 F.2d 1148 (5th Cir. 1979). Indeed, petitioners took a position directly contrary to that now asserted when they opposed transfer to Texas of suits they had brought against meat packers alleging that the meat packers had conspired to underpay the cattlemen. The cattlemen there asserted that "none of the actions [against meat packers or retailers] alleges any conspiracy between the two groups of defendants . . . ." *In re Beef Industry Antitrust Litigation*, 432 F. Supp. 211, 212 (J.P.M.D.L. 1977).

[12] *Beef Industry*, 600 F.2d at 1161-62. The cattlemen had numerous opportunities to amend before judgment: after *Illinois Brick* was decided, after the motions to dismiss were filed, and after the court announced its intention to dismiss. Some petitioners did amend; others chose to stand on their complaints. It was only after final judgment that the court denied the further amendments that are the basis of petitioners' argument here.

[13] Petition No. 79-1959 at 17-18, 20, Petition No. 79-2060 at 15-16, Petition No. 80-103 at 14, and Petition No. 80-105 at 16-20, *citing McLain* v. *Real Estate Board of New Orleans, Inc.*, 100 S. Ct. 502, 511 (1980); *Cruz* v. *Beto*, 405 U.S. 319, 322 (1972); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

language and discretionary action by the district court. Those are not matters warranting this Court's review.

CONCLUSION

The cattlemen's petitions should be denied. The petition submitted by respondents as petitioners in *Safeway Stores, Inc.* v. *Meat Price Investigators Association*, No. 79-1920, should be granted.

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